A

## Ahmad Najib bin Aris v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B–05–28 OF 2005

B ABDUL AZIZ MOHAMAD, MOHD GHAZALI AND AZMEL JJCA

5 MARCH 2007

*Criminal Law — Penal Code — s 300 — Murder — Circumstantial evidence —*

C *Whether circumstantial evidence established the intention to cause death*

*Criminal Law — Penal Code — s 375 — Rape — Circumstantial evidence — Whether circumstantial evidence established sexual intercourse was without free consent of victim*

D

*Evidence — Circumstantial evidence — Nature of — Whether pointed to accused as perpetrator of criminal act*

E *Evidence — Confession — Made to magistrate — Whether magistrate prohibited from recording confession if magistrate has reason to believe confession not made voluntarily — Evidence Act 1950 s 115*

F *Evidence — Credibility — Discrepancies in evidence — Whether discrepancies could be explained away in a manner so as not to shake integrity of conclusion drawn from rest of the evidence*

G *Evidence — Documentary evidence — Computer printout — Admissibility of — Whether certificate under s 90A(2) of Evidence Act 1950 necessary — Conditions for admissibility of computer printout — Whether sufficient to show document was produced by the computer in the course of its ordinary use — Evidence Act 1950 s 90A(1), (2), (6)*

H The appellant was convicted in the High Court of rape and murder. He was sentenced to twenty years' imprisonment and ten strokes of the rattan for the rape, and to death for the murder. He appealed against the convictions and sentences to the Court of Appeal. The record revealed that the appellant had made a confession to a magistrate, which confession the High Court had ruled voluntarily made and

I admissible. However at trial, the magistrate during cross-examination said that if he (the magistrate) knew that the appellant did not make his confession voluntarily, he (the magistrate) could stop recording the confession. However, the magistrate disagreed that in such circumstances, he was obliged to stop recording the confession if the appellant insisted on making a confession. The magistrate testified that he would allow such recording even if he knew that the confession was not made

voluntarily. At the appeal, counsel contended, inter alia: (i) that the High Court had erred in finding a confession made by the appellant to a magistrate under s 115 of the Criminal Procedure Code voluntarily made and for admitting it thereof, and (ii) that certain DNA profiling documents produced by a computer were not admissible because there was absent a certificate such as specified by s 90A(2) of the Evidence Act 1950.

**Held**, dismissing the appeal and confirming the convictions and sentences for rape and murder:

(1) The magistrate's evidence on the recording of the confession contravened s 115(3) of the Evidence Act 1950. If a magistrate has reason to believe a confession is not made voluntarily, he is prohibited from recording it, even if the person concerned insists on making the confession. In the instant case, there were circumstances that raised a strong suspicion that the appellant had been pressured by the police into making a confession, at least with the inducement that if he made a confession he would get a light sentence. The trial judge should have held that the confession was inadmissible. The judge should also have held that the magistrate ought to have refused to record the confession. The confession was thus inadmissible (see para 38).

(2) Because of the word 'may' in s 90A(2), a certificate under subsection (2) is not mandatory for proving that a document was produced by a computer in the course of its ordinary use. As long as there is proof that a document is produced by a computer, s 90A(6) applies to deem the document to be produced by the computer in the course of its ordinary use. In the instant appeal, the Court of Appeal would adopt the prima facie position that under s 90A of the Evidence Act 1950, the only condition for the admissibility of a document produced by a computer and of the statements in the document is as laid down in subsection (1) viz the document was produced by the computer in the course of its ordinary use (see paras 109–110); *Gnanasegaran a/l Pararajasingam* [1997] 3 MLJ 1 followed and *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134 not followed.

(3) In the instant case notwithstanding the inadmissible confession, the circumstantial evidence when considered in its entirety led only to one conclusion that it was the appellant, and no one else, who was responsible for what happened to the victim (see para 120); *Idris v Public Prosecutor* [1960] MLJ 296 referred.

(4) The discrepancies in evidence concerning the identity of the appellant could be explained away in such a manner so as not to shake the integrity of the conclusion drawn from the rest of the evidence (see para 126).

(5) In the instant case, it was impossible to entertain any doubt that the sexual intercourse was without the free consent of the victim. The conviction for the charge of rape was therefore right. There was also no basis for entertaining any probability that the appellant did what he did other than with the intention of causing the death of the victim. Therefore, the conviction for murder was also right (see para 128).

**[Bahasa Malaysia summary**

Perayu telah didakwa di Mahkamah Tinggi untuk perogolan dan pembunuhan. Beliau dihukum penjara 20 tahun dan 10 strok rotan bagi perogolan dan juga pembunuhan. Beliau telah merayu terhadap sabitan dan hukuman kepada Mahkamah Rayuan. Rekod menunjukkan bahawa perayu telah membuat satu pengakuan kepada majistret, di mana pengakuan tersebut telah dibuat secara sukarela dan dan boleh diterima. Akan tetapi pada perbicaraan, majistret semasa pemeriksaan balas menyatakan bahawa jikalau majistret mengetahui bahawa perayu tidak membuat pengakuannya secara sukarela, sebagai majistret, beliau boleh menghentikan pengakuan. Akan tetapi, majistret tidak bersetuju bahawa di dalam keadaan-keadaan sedemikian, beliau diperlukan untuk menghentikan perakaman pengakuan jika perayu diperlukan mendesak untuk membuat pengakuan. Majistret telah memberikan keterangan bahawa beliau akan membenarkan perakaman sedemikian jikalaupun beliau mengetahui bahawa pengakuan tidak dibuat secara sukarela. Pada rayuan tersebut, peguam telah beradu, antara lain: (i) bahawa Mahkamah Tinggi telah membuat kesilapan dalam satu pengakuan tersebut yang dibuat oleh perayu terhadap majistret di bawah s 115 Kanun Acara Jenayah yang dibuat secara sukarela dan juga untuk mengakunya, dan (ii) bahawa DNA profil dokumen-dokumen yang dikeluarkan oleh komputer adalah tidak boleh diterima kerana tidak wujud sijil seperti yang ditentukan oleh s 90A(2) Akta Keterangan 1950.

**Diputuskan**, menolak rayuan dan mengesahkan sabitan dan hukuman bagi perogolan dan pembunuhan:

(1) Keterangan majistret di atas perakaman pengakuan telah melanggar s 115(3) Akta Keterangan 1950. Jikalau majistret mempunyai sebab untuk mempercayai bahawa pengakuan tidak dibuat secara sukarelawan, beliau dilarang daripada merakamkannya, hanya jika orang tersebut mendesak untuk membuat satu pengakuan. Di dalam kes sedemikian, terdapat keadaan-keadaan yang telah menimbulkan syak wasangka bahawa perayu telah ditekan oleh polis dalam membuat satu pengakuan, sekurang-kurangnya dengan pendorong bahawa jikalau beliau membuat pengakuan, beliau akan mendapat hukuman yang lebih ringan. Hakim perbicaraan sepatutnya memutuskan bahawa pengakuan adalah tidak boleh diterima. Hakim juga patut memutuskan bahawa majistret sepatutnya menolak pengakuan tersebut. Pengakuan tersebut adalah tidak boleh diterima (lihat perenggan 38).

(2) Disebabkan oleh perkataan 'may' dalam s 90A(2), sijil di bawah subseksyen (2) adalah tidak mandatori bagi membuktikan bahawa dokumen yang dikeluarkan oleh komputer adalah dalam keguanaan hariannya. Di mana dokumen tersebut dikeluarkan oleh komputer, s 90A(6) menyatakan bahawa dokumen tersebut dikeluarkan oleh komputer untuk kegunaan hariannya. Dalam rayuan ini, Mahkamah Rayuan akan mengambil kedudukan prima facie di bawah s 90A Akta Keterangan 1950, satu-satunya syarat bagi membolehkan penerimaan dokumen oleh komputer dan pernyataan-pernyataan di dalam dokumen tersebut adalah seperti yang ditunjukkan di bawah subseksyen (1) viz

dokumen yang dikeluarkan oleh komputer untuk kegunaan biasanya (lihat perenggan 109–110); *Gnanasegaran a/l Pararajasingam* [1997] 3 MLJ 1 diikut dan *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134 tidak diikut.

(3) Di dalam kes sedemikian tanpa menghiraukan pengakuan yang tidak boleh diterima, keterangan mengikut keadaan apabila dipertimbangkan pada keseluruhannya telah mengakibatkan satu keputusan sahaja iaitu bahawa perayu dan tiada siapa pun adalah bertanggungjawab bagi sebarang perkara yang belaku kepada mangsa (lihat perenggan 120).

(4) Percanggahan dalam keterangan mengenai identiti perayu boleh diterangkan dalam keadaan di mana ia tidak akan mengganggu integriti keputusan yang didapati daripada keseluruhan keterangan tersebut (lihat perenggan 126).

(5) Di dalam kes ini, adalah mustahil untuk menyatakan bahawa persetubuhan itu adalah tanpa keizinan bebas mangsa. Sabitan bagi tuduhan perogolan adalah betul. Juga tidak terdapat asas untuk menyatakan bahawa perayu telah melakukan apa yang perlu dilakukan selain daripada niat untuk menyebabkan kematian mangsa. Oleh itu, sabitan bagi pembunuhan adalah betul (lihat perenggan 128).]

**Notes**

For cases on computer printouts, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1152–1162.
For cases on discrepancies in evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1029–1030.
For cases on nature of circumstantial evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 634.
For cases on s 300, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1129–1130.
For cases on s 375, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) para 1140.

**Cases referred to**

*Abdullah bin Awang Bongkok v PP* [1956] MLJ 90 (refd)
*Chan Ming Cheng v PP* [2002] 3 MLJ 733 (refd)
*Gnanasegaran a/l Pararajasingam v PP* [1997] 3 MLJ 1 (folld)
*Gurubaru Praja v The King* AIR 1949 Orissa 67 (refd)
*Hanafi bin Mat Hassan v PP* [2006] 4 MLJ 134 (distd)
*Idris v PP* [1960] MLJ 296 (refd)
*Mohamed Yasin bin Hussin v PP* [1976] 1 MLJ 156 (refd)
*Mohd Ali Jaafar v PP* [1998] 4 MLJ 210 (refd)
*PP v Law Say Seck & Ors* [1971] 1 MLJ 199 (refd)
*PP v Ong Cheng Heong* [1998] 6 MLJ 678 (refd)
*R v Shepherd* [1993] 1 All ER 225 (refd)
*Ragho Laya v Emperor* AIR 1917 Patna 322 (refd)
*Yap Chai Chai & Anor v PP* [1973] 1 MLJ 219 (refd)

**Legislation referred to**

Criminal Evidence Act 1984 [UK] s 64
Criminal Procedure Code s 115
Criminal Procedure Code [India] s 164

A Evidence Act 1950 ss 24, 90A(1), (2), (4), (6)
Penal Code s 300

**Appeal from**: Criminal Trial No 45–38 of 2003 (High Court, Shah Alam)

B *Mohamed Haniff Khatri Abdulla (Mohd Nadzim bin Ibrahim, Rosal Azimin bin Ahmad and Amir Ajree Meor Nordin with him) (Shamsuddin & Co) for the appellant.*

*Salehuddin bin Saidin (Noorin Badaruddin, Nor 'Amalina Ismail and Roslinda Razali) (Deputy Public Prosecutors) for the respondent.*

C

**Abdul Aziz Mohamad JCA (now FCJ, delivering judgment of the court):**

D **[1]** The appellant was convicted at the High Court in Shah Alam, in the State of Selangor, of the rape and murder of Canny Ong Lay Kian ('the victim') and was sentenced to twenty years' imprisonment and whipping of ten strokes for the rape, and to death for the murder. According to the charges, the offences were committed between 1 and 5am on 14 June 2003 at Batu 7, Jalan Klang Lama, in the District of Petaling Jaya, in the State of Selangor.

E

**[2]** The victim went missing at about 10.45pm the previous evening of 13 June 2003 at the Bangsar Shopping Complex ('the BSC') in the Federal Territory of Kuala Lumpur. Her mother lodged a report of her disappearance at 11.59pm at the Jalan Travers Police Station in Kuala Lumpur, Travers Report 003279/03. Her remains
F were found around noon on 17 June 2003 at a highway construction site at Batu 7, Jalan Klang Lama, in the District of Petaling Jaya. The report of the discovery was Petaling Jaya Report 7487/03. The appellant was arrested at his house on 20 June 2003 between 5 and 6.15am by officers from the Petaling Jaya District Police Headquarters ('IPD Petaling Jaya').

G

**[3]** During the trial, besides other evidence, the prosecution sought to introduce a confession made by the appellant to a magistrate and recorded by him under s 115 of the Criminal Procedure Code. After a trial within a trial to determine the admissibility of the confession, in which the appellant gave evidence, the learned trial
H judge found that the confession was made voluntarily and admitted it in evidence. After considering the evidence adduced by the prosecution, including the confession, the trial judge found that the prosecution had made out a prima facie case of rape and murder against the appellant and called upon him to enter upon his defence, but he elected to remain silent and offered no evidence in his defence. He was thereupon convicted and sentenced as aforesaid. He now appeals to this court.

I

**[4]** The foremost ground in this appeal is that the trial judge erred in law in admitting the confession as one made voluntarily. This question will be dealt with first. The reasons advanced by the appellant's counsel in this appeal for contending that the confession was inadmissible necessitates an examination of the relevant

evidence in the trial within a trial, a task that the trial judge, as appears from his judgment, undertook only cursorily and without attending to the specific reasons advanced.

**[5]** As has been said, the appellant was arrested at his house between 5 and 6.15am on 20 June 2003. He was brought to the IPD Petaling Jaya, straight to the Bilik URJ (Unit Risikan Jenayah or Criminal Investigation Unit), which actually comprised several rooms. That was before 7am. According to the police evidence, he was placed under the charge of the Investigation Officer, P/ASP Muniandy, at 9am. Until then he had been under the charge of P/Supt Ahmad Razil, the head of the Criminal Investigation Department at the IPD Petaling Jaya, who had led the police team that had gone to the appellant's house. The appellant alleged that during the period until he was handed over to Muniandy he was, at different times or in different places and rooms in the Bilik URJ, subjected to various forms of pressure and threat, in order to make him confess, by someone or other among the team of officers who had gone to his house. Where physical mishandling was concerned, the worst that the appellant alleged was that Ahmad Razil delivered several kicks to his face and genitals and crushed his face with a foot, and that one of the kicks resulted in his head knocking against the side of a steel cabinet as he fell. Those allegations were of course denied by the officers concerned. The evidence on both sides as to what happened in this phase needs not be set out in detail because we do not intend to make a finding as to the truth of the appellant's allegations. It is, however, a fact that there was no evidence of any injury to the appellant's body. It is what happened after Muniandy, the IO, took charge of the appellant at 9am that we wish to dwell on.

**[6]** According to Muniandy, the appellant was handed over to him by Ahmad Razil in one of the rooms of Bilik URJ, with instructions to interview the appellant as to his involvement in the case. After a while, Ahmad Razil left the room. Muniandy proceeded to interview the appellant. The appellant refused to answer the questions put to him. As will later be fully related, on the night of 13 June 2003 the police had obtained the identity cards of the appellant and the victim in an incident which, to the police, besides other evidence, linked the appellant to the victim. During the interview, Muniandy showed these identity cards to the appellant and told him that the police had much more evidence that established that he had been with the victim, and asked him to tell the truth. Obviously, on Muniandy's own evidence, the purpose of the interview was to extract a confession from the appellant by facing him with the disclosure that the police had enough evidence against him. Going by Muniandy's evidence in examination-in-chief, it was only after he had asked the appellant to speak the truth that the appellant spoke and that was only to ask who the chief there was. Muniandy mentioned three officers, one of whom was the Head of the Criminal Investigation Department, Selangor, P/SAC II Abu Bakar bin Mustaffa, whose office was at the Selangor Contingent Headquarters. The appellant said that he wished to see Abu Bakar to speak with him about the case. Muniandy, after telling the appellant that he would contact Abu Bakar, left the Bilik URJ to attempt to contact Abu Bakar but, as it happened, Abu Bakar had already arrived. Muniandy informed Abu Bakar of the appellant's wish and, as Abu Bakar directed, took the appellant to another room in the Bilik URJ and left him there with Abu Bakar. That was at about 10am.

Muniandy said that he took the appellant back at about 1.30pm. That means that, on Muniandy's evidence, the appellant was with Abu Bakar for about three hours and a half.

**[7]** The gist of Muniandy's evidence, therefore, is that during the whole interview of about one hour with Muniandy the appellant had refused to answer any question, and it was towards the end, at about 10am, after being told of the evidence that the police had and being asked to speak the truth, that the appellant spoke to express a wish to speak with Abu Bakar and it was also at that juncture that Abu Bakar, whose office was elsewhere, turned up at the IPD Petaling Jaya.

**[8]** That brings us to what Abu Bakar had to say. According to Abu Bakar, he did not go to the IPD Petaling Jaya in connection with the case of the appellant. He was not even aware of the arrest of the appellant. He had gone there to keep an appointment with ACP Syed Ismail, the Deputy Head (Operation) of the Kuala Lumpur Criminal Investigation Department, to discuss the co-ordination of action between the Kuala Lumpur CID and the Selangor CID in the matter of the hijacking of luxury cars. He arrived at the IPD Petaling Jaya at 9.50am and was standing in front of the pavement of the Unit Risikan Jenayah when, at 10am, Muniandy came and informed him of the arrest of the appellant and the appellant's wish to see him. Muniandy took him to a room and left after showing him the two identity cards and telling him that the appellant was the suspect in the Canny Ong case, but without stating how the identity cards linked the appellant to the case. Abu Bakar said he interviewed the appellant until 1.30pm, but not continuously, because at 11am, as appointed, Syed Ismail entered the room and he and Syed Ismail then went into a discussion of the hijacking matter, during which he left the room several times to answer phone calls and to meet people and reporters, so that practically he spoke with the appellant only for about half an hour.

**[9]** As to what transpired between the appellant and him, Abu Bakar said that the appellant told him that he wanted to see him to ask him about such things as bail, where he would be remanded, whether he would be assisted to obtain the services of a lawyer, and whether his wife, who was pregnant, could visit him, to which questions Abu Bakar gave answers, including that the appellant certainly would have a chance to obtain the services of a lawyer. During the interview, Abu Bakar also asked about the appellant's background, such as his employment. Abu Bakar said that he did not ask the appellant to make a confession and that the appellant did not make a confession to him during the interview. He denied pressuring or inducing the appellant to confess, saying that that was not a stage of an investigation by him.

**[10]** In cross-examination Abu Bakar said he knew who the IO was for Jalan Travers Report 003279/03 about the disappearance of the victim, but denied that it was Syed Ismail. As to the choice of the IPD Petaling Jaya for the meeting with Syed Ismail, he said that as Head of the Selangor CID he was free to choose any police station in Selangor for a meeting and he chose the IPD Petaling Jaya because Petaling Jaya had a high crime rate in the State of Selangor.

**[11]** Syed Ismail gave evidence as a rebuttal witness in the trial within a trial after the appellant had given his evidence. For now, some of the things that he said that related to what Abu Bakar had said will be mentioned. According to Syed Ismail, he arrived at the IPD Petaling Jaya between 10.30 and 11am for the appointment with Abu Bakar about the hijacking of vehicles. As to the choice of the IPD Petaling Jaya for the meeting, he said in cross-examination that he had had many meetings with the Selangor police and that formal meetings had been at the Selangor Contingent Headquarters, but the meeting with Abu Bakar was not a formal meeting. As to how long he was with Abu Bakar, he said that it was only for about fifteen or twenty minutes.

**[12]** There are several remarkably curious features in the evidence of Abu Bakar and Syed Ismail. It is very curious that on the very day that the appellant was said to have wished to see Abu Bakar, Abu Bakar and Syed Ismail should have arranged to have an informal meeting at the IPD Petaling Jaya which was not where Abu Bakar's office was. The meeting was apparently fixed for 11am and yet Abu Bakar was already at the IPD Petaling Jaya at 9.50am, shortly before the appellant was said to have expressed a wish to see him. That is another curious feature. Abu Bakar was with the appellant for three hours and a half but said that he practically interviewed the appellant for half an hour only because during the time that Syed Ismail was with him he had to leave the room several times. But if Syed Ismail was with him for only about fifteen or twenty minutes, as Syed Ismail himself said, there were about three hours during which Abu Bakar was with the appellant without leaving the room. It is curious, and hard to believe, that those three hours were devoted to the matters that Abu Bakar said passed between him and the appellant, that is questioning about the appellant's background and employment and answering the appellant's questions about himself. The most curious feature of all is that the need for Abu Bakar to continue to be with the appellant after 11am, when Syed Ismail arrived, should have seemingly become so important that the meeting or discussion about police business which had specially been arranged for, and which must, moreover, have had at least some degree of confidentiality about it, was conducted in a room in which the appellant was present. It is simply incredible. If a meeting about the hijacking had really been arranged, the proper thing to do when Syed Ismail arrived would have been to postpone it to another time if it was not so urgent and Abu Bakar needed to continue to speak or deal with the appellant, or, if the matter was urgent, to cease the session with the appellant or postpone the continuation of it to another time, and proceed with the meeting with Syed Ismail in the room intended for it, of which there is no evidence. But to proceed with confidential police business in the same room in which the appellant was present was so imprudent and unprofessional on the part of senior police officers as to be incredible.

**[13]** The curious coincidences and features that have been highlighted are sufficient justification judicially for entertaining serious doubts about the reason for Abu Bakar and Syed Ismail's presence at the IPD Petaling Jaya being for the purpose of a meeting about the hijacking of motor vehicles and for consequently entertaining instead the probability that these officers' presence at the IPD Petaling Jaya was in connection with the arrest of the appellant. Since their account of the reason for their

presence at the IPD Petaling Jaya on that day is open to serious doubt, it follows that Abu Bakar's account of what passed between him and the appellant is also open to serious doubt.

**[14]** We turn now to the appellant's evidence about what happened between the time when Muniandy the IO took charge of him and the time when Muniandy took him back from Abu Bakar. The appellant said that he went with Muniandy to a room in the Unit Risikan Jenayah and was with him there for about half an hour. During that time Muniandy asked him to confess and told him that, if he did, the police would help to lighten his sentence, but if he did not he would be severely beaten. The appellant denied being shown the two identity cards or telling Muniandy that he wished to see anybody. At the end of that time Muniandy said that it mattered not if the appellant did not wish to confess, since his officers would be arriving shortly, and told him to leave the room and think about it carefully.

**[15]** The appellant said that about half an hour later Abu Bakar arrived and after a while he was taken by Ahmad Razil to a room where Abu Bakar was waiting. After giving Abu Bakar the two identity cards, Ahmad Razil left the room. The interview had proceeded for about five or ten minutes, during which Abu Bakar showed the appellant his identity card, when Syed Ismail entered the room with an assistant, who remained in the room with Syed Ismail until they both left after about thirty to forty-five minutes. Abu Bakar showed the appellant the victim's identity card and asked him to tell the true story. The appellant remained silent. Syed Ismail told him that if he confessed to raping and murdering the victim the police would endeavour to obtain a light sentence for him and he would not be beaten. Abu Bakar told the appellant of the connection of the identity cards to the case and said that the appellant was involved. When he denied it, Abu Bakar and Syed Ismail became angry and shouted at him. He related the truth as far as he knew it, but they interrupted him, saying that it was a lie and a fabrication. Syed Ismail said to him in a high tone, as we render it into English: 'Don't trifle with (melekehkan) our work … We have much other work to do … Confess and co-operate with us … I have been thirty years with the police and I know your story is a lie (mengarut)'. Syed Ismail further said that they had strong proof and Abu Bakar said that it was in the things seized from the appellant's house. Finally, after Abu Bakar and Syed Ismail said that if the appellant did not co-operate and confess his wife, child and parents could be charged for complicity and imprisoned, and fearing that that might happen, the appellant, with Abu Bakar's assistance whenever he ran out of ideas, fabricated a story that would be consistent with the exhibits. The appellant said that what he said was written down by Abu Bakar on five or six sheets of yellow paper sized A4 after he had finished relating his story.

**[16]** The appellant said that he asked Abu Bakar whether he could get a lawyer and Abu Bakar answered that it was not necessary to have a lawyer because he had Abu Bakar's promise that his sentence would be lightened.

**[17]** The appellant said that after his session with Abu Bakar he was moved to another room where he remained for about ten to fifteen minutes before he was

brought back to Muniandy's room. During that time he saw Abu Bakar, Syed Ismail, Ahmad Razil, Syed Ismail's assistant and several police officers holding a meeting in a room.

**[18]** Abu Bakar and Syed Ismail gave evidence in rebuttal. Abu Bakar denied the appellant's allegations. As regards the services of a lawyer, Abu Bakar said that he told the appellant that he could obtain them and denied telling the appellant that it was not necessary to have a lawyer.

**[19]** Syed Ismail denied speaking with the appellant and maintained that he only spoke with Abu Bakar and it was about hijacking cases. There is one thing about Syed Ismail's evidence which is revealing. In examination-in-chief Syed Ismail denied saying to the appellant, as the appellant had alleged, that his story was a lie and that he, Syed Ismail, had been in the police force for thirty years. As if to prove that he did not say those things to the appellant, he added that he had been in the police force for only twenty-seven years. And in cross-examination he said that at the time in question, June 2003, he had been in the police force for twenty-six years. The reason why we say that this part of Syed Ismail's evidence is revealing is this. The difference between twenty-six and thirty is not much. It is probable that the appellant, when he gave evidence, chose the closest round figure, thirty. Twenty-six or thirty, what did it matter? The point was to say that Syed Ismail said that he had been in the police force for a long time. For that, thirty was as good as twenty-six. One means by which the appellant could have known that Syed Ismail had been in the police force for that number of years was from Syed Ismail's own mouth. There is no evidence of any other likely means. It is therefore highly probable that Syed Ismail did mention to the appellant the length of his service in the police force and that he mentioned it, as the appellant said, to impress upon him the futility of telling lies. He himself, to make his point and for convenience, might have mentioned thirty years. It is therefore highly probable that, contrary to his denial, Syed Ismail did speak with the appellant. Once that probability is entertained, the probability that the appellant's version of what happened when he was with Abu Bakar and Syed Ismail was true, namely, that he was pressured to make a confession, cannot be discounted.

**[20]** Although the confession that the appellant alleged that he made to Abu Bakar is not in issue in this case, and what is in issue is the confession that the appellant subsequently made to the Magistrate, the evidence that has been related and considered serves to show the likelihood of the existence of influences that were exerted on the appellant's mind before he made the confession to the Magistrate.

**[21]** We turn next to consider the evidence of what happened after the appellant came back to Muniandy from his meeting with Abu Bakar. The evidence of Muniandy is this. He resumed custody of the appellant at 1.30pm and was with him until they left for the Magistrate's Court at 2pm to obtain a remand order. They arrived at about 3pm. In the Magistrate's chambers, during the remand proceedings, the appellant tried to tell the remand Magistrate, Puan Yasmin binti Abd. Razak, that he wished to plead guilty but Muniandy told him that the occasion was for a remand application and that if he wished to make a confession Muniandy could arrange for a Magistrate to take his confession. In cross-examination,

Muniandy qualified this by saying that it was while they were waiting in a queue for him to make the remand application that the appellant told him that he wished to make a confession. Muniandy said that he subsequently saw Magistrate Tuan Mohammed Rushdan bin Mohamed who asked that the appellant be brought to him next day, 21 June 2003, at 10am. Muniandy told the appellant about the arrangement and the appellant agreed with it. They arrived back at the IPD Petaling Jaya at about 5.00pm and Muniandy continued to interview the appellant for about half an hour until 6pm, when the appellant was taken to the lock-up. Next day Muniandy and the appellant left the IPD Petaling Jaya at about 9am for the appointment with the Magistrate at 10am. Muniandy said that within that time he asked the appellant whether he still wished to confess and the appellant said that he was repentant (menyesal) and wished to confess.

**[22]** The appellant's version of what happened after he went back to Muniandy from his meeting with Abu Bakar is as follows. He was with Muniandy in Muniandy's room for about twenty minutes before they left for the magistrate's court. He told Muniandy that he had confessed to Abu Bakar. Muniandy asked him to proceed on and plead guilty before the magistrate to whom they were going for a remand order. Muniandy told him to do as he asked because he had promised to have his sentence lightened and to plead on his behalf. At the magistrate's court, before appearing before the magistrate, Muniandy reminded him to plead guilty. When the magistrate gave him the opportunity to say what he wished to say, he pleaded guilty as Muniandy had instructed. The magistrate told him that that day was for remand business and that if he wished to plead guilty he could do so before the judge. The appellant said that he did not inform the magistrate of the beatings and threats by the police because Muniandy had told him not to.

**[23]** Back at the IPD Petaling Jaya he was again in Muniandy's room for about forty-five minutes. He asked Muniandy what the sentence would be for rape and murder. Muniandy told him it would be thirty years but Muniandy would plead for him and the sentence would be reduced to ten to fifteen years. Muniandy told him that in the morning he would take him to meet the confessional Magistrate and he asked him to confess to the rape and murder of the victim. Muniandy also told him that if the magistrate asked him whether he had been asked by the police to confess, or whether he had been beaten or threatened by the police, he was to say no.

**[24]** Next day, before leaving to see the magistrate, Muniandy reminded him of the questions that the magistrate would ask and of what Muniandy had told him the previous evening he was to say in answer. Muniandy gave him the same reminder when he was waiting to see the magistrate. He said he thought that he was going to face a trial before the magistrate.

**[25]** We will now deal with the proceedings between the magistrate and the appellant, which were conducted in Malay. Before the magistrate recorded the confession he conducted an inquiry by asking the appellant certain questions. There were thirty-three questions. The answers to them were recorded unnumbered in the Memorandum of Inquiry. For present purposes, they are numbered 1 to 33.

Where it is necessary to quote the actual answers, they will be rendered into English, and literally where it is necessary to retain the flavour of the original answers in Malay.

**[26]** Question 4 was why the appellant wished to see the magistrate. The answer was: 'I wish to tell about my serious crime case and I wish to plead guilty before Tuan Majistret and consideration of my plea (pertimbangan rayuan saya)'. The magistrate, in cross-examination, said that he did not know the meaning of pertimbangan rayuan and that it never crossed his mind that the appellant considered that he was present at a trial. The appellant, in the trial within a trial, explained that what he meant was that he was facing a trial and expected a light sentence from the magistrate. The word rayuan could only have meant a plea for a light sentence. It is obvious that the answer meant that he wished to plead guilty in the hope that the Magistrate would be considerate as to the sentence. He must have thought that it was a trial at which the magistrate had the power to pass sentence, as otherwise he would not have expected the magistrate to give consideration to the sentence. Had he known that murder was punishable mandatorily with death, even on a guilty plea, he would not have entertained the hope of getting a lighter sentence. That he asked for a consideration of the sentence meant that to his mind the sentence would only be one of imprisonment. The appellant's answer to Question No 4 is consistent with his evidence that Muniandy had told him that the sentence would be thirty years.

**[27]** Question 5 was, when was it that he decided to speak to a magistrate. The appellant's answer was that it was after he made an explanation (membuat penjelasan) to Abu Bakar the previous day. The magistrate did not ask further what was the penjelasan that he made to Abu Bakar and what caused him to make it. On the evidence, the penjelasan could only have been the confession that the appellant alleged he was pressured to make to Abu Bakar.

**[28]** In answer to Questions 6 and 7 the appellant said that he informed Muniandy of his decision to see a magistrate and Muniandy said that he could help the appellant to see a magistrate. When asked in Question 8 whether Muniandy had suggested that the appellant see a magistrate, the appellant said that Muniandy did not suggest anything except that Muniandy informed him at the beginning of the investigation that 'if I help him in the investigation, he too will help me'. The magistrate did not ask the appellant what help was it from the appellant that Muniandy meant or that he thought Muniandy meant. The magistrate disagreed in cross-examination that helping in the investigation meant helping by making a confession. In answer to Questions 9 and 10, the appellant said that neither Abu Bakar nor anyone else had suggested that he see a magistrate. Since, according to the appellant, no one had suggested to him to see a magistrate, it should have crossed the magistrate's mind to ask the appellant what then gave him the idea, after he had seen Abu Bakar, of seeing a magistrate. But the appellant was not asked the question. In fact, later, in relation to the appellant's answer to Question 22 that that was the first time he had seen a magistrate, the magistrate said that it did not cross his mind to ask the appellant how he knew about seeing a magistrate.

**[29]** Questions 11 to 19 were generally to ascertain that the appellant came voluntarily to make a confession, that is, that it was not as a result of any threat, promise or inducement, and the appellant's answers amounted to that his wish to confess was voluntary. But when asked in Question 20 whether anybody had told him that by making a confession he would get a lighter sentence, the appellant answered in the negative, but again said that Muniandy told him that if he assisted in the investigation Muniandy would help him, and that that was both before and after he had seen Abu Bakar.

**[30]** The answers to Questions 23 to 28 are important.

**[31]** Question 23 was whether the appellant understood that he was not obliged to make a statement if he did not wish to. The answer was:

> I do not know. I now feel pressured with my crime. I confess on the basis of my act and I do not have the means to find an advocate for me if I do not confess …

When asked by Question 24 whether he meant that if he had an advocate he would not make a statement, he said:

> If I am not pressured, without sincerity I might I will not confess if I have an advocate.

When asked by Question 25 what he meant by that, he said:

> I mean the proof of my case for the police is actually plenty and clear. My meaning in saying that I will not confess if I have an advocate is that there is no article of proof (barang bukti) at all with the police and I have not been forced (dipaksa-paksa) by the police.

When asked by Question 26 what he meant by being forced by the police, he said:

> It means I am asked to confess without seeing the articles of proof and exhibits.

When asked by Question 27 to state his meaning, the appellant said:

> Actually I was not forced. In the beginning on the day of arrest I wanted to confess and give a true explanation (keterangan) if I was not treated badly by the police. I will confess if I was shown the articles of proof by the police. My confession is actually from the beginning of events (awal kejadian) but with the actual exhibits that I used, meaning that I wished to confess not yet sincerely without the articles of proof. I confess if it is actually true that I used the exhibits.
>
> When with Tuan Abu Bakar and the Police Inspector from K.L., I was shown the true articles of proof and after being shown them my sincerity increased to make a confession.

Finally, when asked by Question 28 whether he came to confess because he had seen plenty of articles of proof or for some other reason, the appellant replied:

> I meet the magistrate because I wish to confess by the sincerity of my heart. I said just now that I wished to engage a lawyer and will not confess if the exhibits are not mine. My confession today is sincere and without promise or inducement by anybody.

The appellant's answers to the rest of the questions and to the magistrate's warning at the end of the inquiry give the appearance that the appellant was determined to make a confession.

**[32]** It will be seen that each of Questions 27, 26, 25 and 24 was necessitated by the manner in which the appellant had answered the question before it, a manner which called for clarification. The first need for clarification arose because in answer to Question 23 the appellant did not just say that he did not know that he did not have to confess but nevertheless he wished to confess. The appellant went further and gave the reason for wishing to confess, which apparently was that he felt pressured by his crime and had no means to engage a lawyer. The answer necessitated Question 24, the answer to which necessitated Question 25 and so on until Question 27. The magistrate said that the answer to Question 26 was not clear, which means that, to him, up to Question 27 none of the answers, which were all about why the appellant wanted to confess, had been clear. We have attempted to analyse step by step each of the answers from that to Question 23 to that to Question 26, and it seems to us that by the time the appellant had answered Question 26 what ultimately he had been saying was that if he had a lawyer, and he had not been shown articles of proof against him and was not forced by the police to confess, he would not confess, but which naturally follows and is reflected in the answer to Question 26 that he would confess if he had been shown the proofs against him and the police asked him to confess, even though he had a lawyer. The conclusion that might have been drawn is that the appellant wanted to confess because he had been shown the proofs and asked by the police to confess.

**[33]** It was in answer to Question 27 that the appellant virtually wiped away all his previous answers and the implications to be drawn from them by saying, in effect, that he was not forced or ill treated by the police but wished to confess solely because he had been shown the evidence against him, and that it had been his intention from the moment of his arrest to confess if he was shown the proof against him and the police did not mistreat him. The implication is that even if he was confronted with the proof he would not confess if he was mistreated and asked to confess, which, however, strikes us as an unnaturally robust attitude.

**[34]** In answer to Questions 16 and 18 the appellant had already stated unequivocally that no one had forced or threatened him to make a confession. It will be seen from the answers to Questions 23 to 26, questions which did not make any mention of force or threat, that the idea of being forced to make a confession nevertheless kept surfacing in the appellant's mind which, by his answer to Question 27, he virtually dismissed as an idle thought. The magistrate was asked in cross-examination whether by his answer to Question 27 the appellant wanted to conceal from the magistrate the fact that he was induced to make a confession. It was a fair question, considering that the tone of the answer to Question 27 contradicted that of the answers to previous questions and that the answer to Question 27 was contrived and unnaturally gallant. The magistrate disagreed.

**[35]** It is significant that in cross-examination the magistrate said that if he knew that the appellant did not make his confession voluntarily he could (boleh) stop recording the confession but he disagreed that he must stop recording the confession; if the appellant insisted on making a confession, he would allow it even if he knew that the confession was not made voluntarily. The attitude betrayed by those statements contravenes subsection (3) of s 115 of the Criminal Procedure Code

which says: 'No Magistrate shall record any such statement or confession unless upon questioning the person making it he has reason to believe that it was made voluntarily …' If a Magistrate has reason to believe a confession is not made voluntarily, he is prohibited from recording it, even if the person concerned insists on making it.

**[36]** The appellant, in explaining in examination-in-chief in the trial within a trial his answers to Questions 25 and 26, said that although he had tried to comply with Muniandy's instructions to him not to say that he had been forced, threatened, induced or beaten by the police, nevertheless the word 'dipaksa-paksa' did inadvertently escape from his mouth. That is quite understandable because it seems to us that if the appellant's wish to confess had been induced by the police and was therefore not voluntary, and he had tried to conceal the fact, as instructed by the police, it would have required a lot of self-control on his part in answering the magistrate's questions to ensure that no indication of the fact was given by him, and the chances are good that he would have betrayed the fact, no matter how important it was to him to have the confession through so that, as he said he thought, his sentence would be lightened.

**[37]** The learned trial judge, after setting out very briefly only some of the evidence of the witnesses in the trial within a trial, including the appellant, dealt only with the appellant's allegation of his rough treatment at the hands of the police and rejected the allegation on the grounds that, until the confession was sought to be introduced, he had not complained of such treatment, and that no physical injury had been sustained by him. Then he proceeded to show that, in various aspects, the evidence that had been adduced in the trial bore out the contents of the appellant's confession, which therefore he must have been satisfied were true. After that he said that he rejected the defence (that is the appellant's) evidence, including the allegation of inducement and threat, because it was inconsistent with the facts proved in court, which we take to mean the evidence of the prosecution witnesses in the trial within a trial, and with the appellant's 'pengakuan' before the magistrate, which we take to mean his answers in the magistrate's inquiry as to voluntariness. It all shows only a superficial evaluation of the evidence in the trial within a trial, with concentration on the allegation of physical mistreatment by the police and on comparing the contents of the confession with the evidence adduced in the trial. Although the trial judge did not expressly say that the comparison proved that the confession was voluntary, the fact that he made the comparison in the course of considering the voluntariness of the confession raises serious concern that the satisfaction that he must have derived from the comparison that the contents of the confession were true weighed with him in deciding that the confession was voluntary. It is necessary to see what s 24 of the Evidence Act 1950 says:

> A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

It provides in effect that a confession is irrelevant (and therefore inadmissible) if it is not voluntary. It applies to any confession, whether true or not. The quality of a

confession is not relevant to its voluntariness. It is relevant only to the weight to be given to the confession as a piece of evidence and only after it has been admitted in evidence as having been voluntarily made.

**[38]** Various authorities on confessions were cited by learned counsel for the appellant, but mention will be made of only the few that we consider are the really important ones for this case. To begin with, in *Public Prosecutor v Law Say Seck & Ors* [1971] 1 MLJ 199, Sharma J said at p 201 (bottom left): 'If the accused is able to point to some circumstances which arouse suspicion the confession cannot be admitted'. That was said in considering the meaning of the word 'appears' in s 24 of the Evidence Act 1950. Gopal Sri Ram JCA, in *Chan Ming Cheng v Public Prosecutor* [2002] 3 MLJ 733, elaborated on Sharma J's statement in the following words at p 740:

> … There is also no burden on an accused to raise a reasonable doubt as to the voluntariness of a cautioned statement. The only burden on an accused is to show suspicious circumstances surrounding the making of or recording of the cautioned statement. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial Judge to hold it inadmissible.

**[39]** Subsection (3) of s 115 of the CPC has been quoted. In *Ragho Laya v Emperor* AIR 1917 Patna 322, Roe J, in reference to the corresponding Indian provision, said at p 325:

> … What is meant by the Code is that the Magistrate should ask the accused some such question as 'why are you confessing? are you sorry for your crime or is it that some one has told you that you will gain something by a confession,' and to refuse to proceed with the recording of the confession until he has had a satisfactory answer to his question.

That was referred to with approval by Sharma J in *Law Say Seck* at p 200 (E–F right).

**[40]** In *Gurubaru Praja v The King* AIR 1949 Orissa 67, Ray CJ, in reference to s 164 of the Indian Criminal Procedure Code, which corresponds to our sn 115, and after citing a string of cases, said:

> … All these cases go to establish not only that the requirements of s 164 are imperative but that the mere satisfaction of the recording magistrate that the confession was made voluntarily is not enough but that both from his evidence as well as from what he has recorded in the form of questions to the accused and his answers, it should appear explicitly to the Judge, who has to consider the admissibility of the statement, that they [sic] were made voluntarily.

**[41]** The learned DPP also cited a string of authorities on confessions, but most of them are commonplace and are of no assistance in the circumstances of this case and none of them questions the principles in the authorities cited by the appellant's counsel that have been set out. Mention, however, may be made of *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219, a Federal Court decision, where Ong CJ said at p 221H (right):

> … it should be noted that, once the effect of any wrongful inducement to make a confessional statement is definitely removed by careful questioning reinforced by a clear

warning from the magistrate, causing the latter to be satisfied in his own mind that the statement forthcoming is made of the dependent's own free will, then the statement should be admitted in evidence: see *Abdullah bin Awang Bongkok v Public Prosecutor* [1956] MLJ 90.

**[42]** What we have attempted to do in considering the evidence of what happened between the time when the appellant was given to the charge of Muniandy until the time when he made the confession is to show the existence of circumstances that raise a strong suspicion that the appellant had been pressured by the police into making a confession, at least with the inducement that if he made a confession he would get a light sentence. These circumstances have been remarked upon in the course of narrating the evidence. The trial judge should have held that the confession was inadmissible. As to the appellant's answers to the magistrate before he made the confession, there are plenty of indications in them as may be gathered from the observations that have been made in the course of considering the answers that the appellant did not make the confession in a state of contrition but in the hope of getting a light sentence and as a result of being pressured by the police. The learned judge should have held that the magistrate should have refused to record the confession. Although the answers to the questions after Question 28 may give the appearance that the appellant was voluntarily determined to make a confession, we do not think that this circumstance alone brings the case within the situation envisaged in the passage quoted earlier from *Yap Chai Chai*. That passage was inspired by what happened in *Abdullah bin Awang Bongkok v Public Prosecutor* [1956] MLJ 90 where the appellant told the magistrate, in answer to the question whether anyone had promised him that he would be let off easily if he made a statement to a magistrate, that one Malay police constable whose name he did not know told him that if he made a statement he might be let off and Mathew CJ on appeal said that the effect of the promise was removed by the careful questions put subsequently to the appellant and that 'it would appear from the answers to those questions that no promise was in fact ever made'. It is highly likely that it was the latter finding of fact on appeal that influenced Mathew CJ to find that the effect of the alleged promise had been removed by the subsequent questions and the answers to them. In the present case, such a finding is not possible because there is other evidence, which did not exist in that case, that raises a strong suspicion to the contrary. Moreover, where the magistrate was concerned, it would appear from his answers in cross-examination that he was insensitive to the indications against voluntariness in the appellant's answers, that have been highlighted, to some of the questions put to him and that therefore he could not have considered whether the answers to Question 28 and the rest of the questions after that removed the effect of those indications so as to satisfy him that the confession that was to be made was voluntary. It would appear from his answer to the question in cross-examination that has been mentioned that even if he felt that the appellant's answers indicated absence of voluntariness, he would have recorded the confession all the same.

**[43]** For the reasons that have been set out, in our judgment the confession is inadmissible.

**[44]** Since the evidence on which the learned trial judge found that the prosecution had made out a prima facie case against the appellant included the confession, and since the confession is inadmissible, it now becomes necessary to undertake an examination and evaluation of the rest of the evidence in order to consider whether it warrants the conviction of the appellant for the rape and murder of the victim. The appellant's counsel contended that without the confession there was nothing to support the conviction. With this development, the submission of the appellant's counsel that after the appellant chose to remain silent the trial judge should have undertaken a revaluation of the evidence for the prosecution becomes irrelevant and does not have to be considered.

**[45]** The appellant was an employee of Susur Asia Sdn Bhd ('SASB'), whose function was to clean the aircraft of MAS and other aircraft at Subang Airport. SASB's workers were at the material time stationed at Hangar 2 (Complex A) at Subang Airport and were divided into several teams. The appellant was a team leader. On 13 June 2003, the appellant was scheduled to work the night shift from 7.45pm to 4am, but he was absent without leave. His wife was a clerk with Maybank at Maybank Headquarters in Kuala Lumpur. When he went to work he was in the habit of wearing a Maybank jacket and carrying a Maybank sling bag.

**[46]** The victim lived in the USA. She had come back to Malaysia on 1 June 2003 to visit her father who was ill and she was due to leave for the USA on 14 June 2003. So that she could be with her friends before she left, a farewell dinner had been arranged for the evening of 13 June 2003 at Restoran Monte in the BSC for nine or ten people, including a younger brother of hers. She went to the BSC with her mother, driving a Proton Tiara motor car, registration number WFN 6871, of purplish-blue colour, belonging to her father and used by her mother.

**[47]** BSC had three floors for the parking of motor vehicles: Lower Ground, Basement 1 and Basement 2. The system was automatic. To enter, you get a ticket from the machine, upon which the bar lifts to allow entry of the vehicle. On leaving, you pay the parking fee at one of the autopay machines which registers the payment on the parking ticket. You then go to your vehicle and drive to the exit where you slot the paid ticket into the machine, which swallows it and triggers the bar to lift and allow your egress. Unless your ticket is paid you cannot make the bar go up. For convenience of payment, you carry your ticket with you on leaving the car after parking it, otherwise, when it comes to paying at the autopay, you have to go first to your car, get the ticket, come back to the autopay and go back to your car to leave the building.

**[48]** The victim's mother, Madam Pearly, said that they arrived at the BSC at about 8.30pm. The victim obtained a parking ticket, drove the car into Basement 1 and parked it in a parking lot near pillar 3B. The victim and her mother left the car and proceeded to the lifts. The parking ticket was left in the car, a fact which the victim mentioned to her mother on their way to the lifts, but they proceeded on to the lifts and went up to Restoran Monte.

**[49]** There were closed-circuit TV (CCTV) cameras at various points in the parking floors and at the autopay stations. What they saw were recorded on videotape. Certain images of what the cameras saw that evening were reduced from videotape P19C to eleven still pictures which were tendered in evidence as P29. The appellant's counsel, relying on *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210, submitted that the videotape was inadmissible and therefore the pictures were inadmissible. That was a case of corruption where the appellant, an immigration officer, was alleged to have sought sexual favours of the complainant. After the complainant reported the matter to the Anti-Corruption Agency, arrangements were made for the tape-recording of conversations between the complainant and the appellant on different occasions for the purpose of establishing a case against the appellant. It must be appreciated that the recording was the recording of the human voice and that for the recording to be capable of being used as evidence against the appellant there must be no doubt that the conversations were those of the complainant and the appellant and that the recording was accurate as to the contents of the conversations. It must also be appreciated that the recording was done for a specific purpose directed at the appellant and therefore all concerns must be dispelled that the recording had been tampered with to the detriment of the appellant. The tapes were admitted in the Sessions Court and the appellant was convicted. On appeal, Augustine Paul J (now FCJ) considered the law as to the requirements for the admissibility of a voice recording and held that the tapes should not have been admitted, but the sole reason why he so held was that it had not been proved that the recordings played in court were those of conversations between the complainant and the appellant because the only person who could testify to that, that is the complainant herself, had not done so.

**[50]** In the present case, the recording was a recording of images, and it was not done for a specific purpose aimed at the appellant. The CCTV cameras were for general surveillance to detect undesirable activities as and when they occurred and also for reference back, when the need arose, in order to see what happened at a particular time and at a particular spot. Such a purpose of the system would be defeated, and the system be made a mockery of, if the system were defective or if it was tampered with so that it will not record faithfully what actually happened. There is no reason to fear, and there is no evidence to suggest, that the system in this case was defective or that the videotape had been tampered with either before or after it got into the hands of the police. The evidence is in fact to the contrary. And neither has it been suggested in what way the videotape or the still pictures reduced from it were unreliable except that the images captured were not as clear as might be desired. But that goes to the question of the assessment of the images and the weight to be attached to them, but does not render them inadmissible.

**[51]** Pictures 1 and 3 show a Proton Tiara moving along a driving lane of a parking floor at 58 seconds after 8.24pm and 37 seconds after 8.26pm respectively. The plate number is not clear. Pictures 4 and 5 show two women walking one in front of the other past pillar 9C at, respectively, 32 and 35 seconds after 8.29pm. It is not apparent where pillar 3B, near which the victim parked her car, was in relation to pillar 9C. According to DSP Amidon bin Anan, Head of the Forensic Unit at the Contingent Police Headquarters, Selangor, at Shah Alam, it was the picture of the

victim and her mother walking to the lifts after leaving their car. The facial features are not distinguishable but we are sure that DSP Amidon judged rightly from other physical features of the two women. In any case, the facts established by the pictures were already established by the evidence of Madam Pearly, so that the pictures are not really important, except as confirming Madam Pearly's evidence that they arrived at the BSC at about 8.30pm. In this connection, there is a discrepancy with the parking ticket, which shows that the Proton Tiara entered the parking floors ten minutes later, at 8.40pm. Since the time mentioned by Madam Pearly tallies fairly with the times shown in pictures 4 and 5, the only conclusion that may be drawn from this discrepancy, which was not raised in the submissions in the appeal, is that the clock of the entry ticket machine was fast by about ten minutes.

**[52]** Pictures 6, 7, 8, 9 and 10 show one and, we are certain, the same man. He was dressed in a light upper garment, dark trousers and a light baseball cap. He was carrying, slung on his right shoulder by a long strap, a sling bag which, according to Mr. Siva Kumar a/l Ramiah, the MAS Store Officer who worked at Hangar 2 (Complex A), Subang Airport, was similar to the bag that the appellant was in the habit of carrying to his place of work. DSP Amidon was insistent, even in cross-examination, that the man in pictures 6, 7 and 9 was the appellant. Pictures 6 and 7 show the man walking on a parking floor 48 and 51 seconds, respectively, after 8.49pm, about 20 minutes after the victim and her mother had gone to the lifts.

**[53]** The dinner ended at about 10.15pm. The man in the pictures was still around. Pictures 7, 8, 9 show him moving about in the vicinity of pillar 9C at, respectively, 27 seconds after 10.22pm, 28 seconds after 10.22pm and 4 seconds after 10.24pm.

**[54]** According to Madam Pearly, she and the victim, in the company of a few others from the dinner, went down to pay the parking fee at the autopay machine at about 10.30 to 10.45pm, but when they arrived there they remembered that the parking ticket had been left in the car. So after asking her mother, who was supposed to return home alone driving the car, to wait in the queue for her turn to pay when the ticket arrived, the victim went to the lifts to go down to Basement 1 to get the parking ticket from the car and bring it to her mother. According to Mr. Lim Ah Seng, the Parking Operations Executive of the BSC, who, later in the night, viewed one of the CCTV videotapes, P19A, he saw on the videotape Madam Pearly arriving to queue up at the autopay station on the Ground Floor, which was one floor above Basement 1, at 10.30pm, followed by the victim, who left the place, came back and left again. The victim was identified to him by Madam Pearly and the victim's friends. That was the last time Madam Pearly saw her daughter alive, for she never came back.

**[55]** Picture 11 shows a Proton Tiara, registration number unidentifiable, on a driving lane of a parking floor at 58 seconds after 10.32pm.

**[56]** Mr. Lim, who viewed another CCTV videotape, P19B, after viewing videotape P19A, said that he saw on videotape P19B a Proton Tiara exiting at Exit A at about 10.50pm, which was seventeen minutes later, without the slotting of the parking ticket to lift up the bar, which remained in place, so that the car slightly

touched the bar, which early on the following morning he found to have dropped down and sustained a slight dent. Mr Lim said that from the videotape the driver wore a light dress and a dark figure was seated next to him.

**[57]** About twenty-five minutes later, at about 11.15pm, Proton Tiara WFN 6871 was sighted parked at a roadside in a deserted area in Taman Perindustrian Jaya, Kelana Jaya, in the State of Selangor, near Subang Airport, by L/Kpl Ravichandran a/l Subramaniam of the Kelana Jaya Police Station, who was on crime-prevention rounds on separate motorcycles with a police constable. When they came back half-an-hour later, at about 11.45pm, the car was still there. This time Ravichandran stopped by the driver's door and got off his motorcycle to investigate. There were two persons in the car, the driver and one in the passenger seat. It was not in question in the appeal that the passenger was the victim. Ravichandran shone his torch on both of them. After showing his authority card, he asked for their identity cards, which each of them handed to him. The driver was a male who, according to Ravichandran, wore a dark blue sweater, the colour of the police uniform, and a dark-coloured cap. He gave his name as Ahmad Najib bin Aris, the name of the appellant. The identity card was that of the appellant. Ravichandran compared the driver, with the cap removed, with the photograph in the identity card and found that the driver was the person in the identity card. When asked to get down to be searched, he refused, saying that he was doing nothing wrong, just discussing a little problem with his girlfriend. He said that he worked in Subang. Ravichandran again asked him to come out but he asked that Ravichandran show again his authority card, which Ravichandran did. The victim, who to Ravichandran appeared quiet and relaxed, opened her door but the appellant forbade her to leave the car, saying that the police officers were actually robbers. So she shut the door. Ravichandran again asked the man to come out, threatening to take both of them to the police station if he did not. Then the victim, when the man was not looking in her direction, made a sign to Ravichandran by placing both palms together in an attitude of prayer and pointing them to her chest and to the man. She did this a couple of times, stopping when the man, who kept refusing to leave the car, turned towards her. It was, as the appellant's counsel himself said, a sign of a plea for help. When the man at last realized that the victim was giving the sign, he locked the doors of the car by pressing down the locking knob on the driver's door. Ravichandran tried to open the door, the man wound up the glass of the driver's door, which he had wound down when Ravichandran came to the car, and tried to get the car going. Ravichandran fired two shots at the right front tyre and the car sped off. The other police officer immediately gave chase, followed by Ravichandran, who had first to get on his motorcycle and start the engine, but, surprisingly, they failed to catch up with the car, even though, as established by other evidence, the shots or one of them punctured the tyre, which subsequently became deflated. The identity cards of the victim and the man remained with Ravichandran.

**[58]** We mentioned earlier that it was Proton Tiara WFN 6871 that Ravichandran sighted. Actually Ravichandran, surprisingly, was not sure whether it was a Kancil or a Tiara and did not observe the number of the car, but in this appeal it was not questioned that it was Proton Tiara WFN 6871.

**[59]** Ravichandran was to identify, in an identification parade and in court, the appellant as the driver of the car. The correctness of the identification, including the correctness of the procedure at the identification parade, has been in question in this appeal, but we are satisfied, particularly from Ravichandran's comparison of the man's appearance with the photograph in the identity card that he gave, that the man was the appellant.

**[60]** It is convenient at this stage to consider the significance of the evidence of Ravichandran in itself and in relation to the images seen on the CCTV tapes. Ravichandran's evidence established that about forty-five minutes after the victim left her mother at the BSC to get the parking ticket from the car and bring it to her, but did not return, she was found in the car seated next to the appellant, who was in the driver's seat and must have been driving the car and who was a total stranger to her. Although Ravichandran said she was calm and quiet, she was in a state of fear, because she signalled for help, but did not have the courage when the two police officers were present to scream for help or make a dash for safety. It was established that the parking ticket was not paid but remained in the car. Therefore the car had exited the BSC without the usual means of triggering the raising of the bar by using the ticket. The victim herself would not have exited the building in that way, driving the car. In any case, she was due to leave the BSC by some other means and she would not have driven the car away by her own wish and left stranded her mother, who was waiting for her at the autopay station and who was going to drive the car to go home. It was therefore against her will that the car was driven out of the BSC, and in that manner, and with her in it. For all that to happen some form of compulsion must have been used on her by a person who, naturally, had to be in the car with her and in control of it when it proceeded to leave the building. The person would have to be the appellant because it is inconceivable, and there is nothing to suggest or indicate it to be likely, that another person had abducted the victim from the BSC and the appellant took over from him after the car, with the victim in it, had left the building.

**[61]** Those are the inevitable conclusions to be drawn from the evidence so far. Those conclusions are valid and inevitable even without the evidence of the sightings by the CCTV cameras. It does not matter if it is not conclusive that it was the appellant who was sighted by the cameras. It does not matter that the Proton Tiara which upset the exit bar is not conclusively proved to be Proton Tiara WFN 6871 and that the person driving it and the figure sitting next to him are not conclusively proved to be the appellant and the victim. The conclusions remain valid. But the sightings serve to confirm the conclusions and to demonstrate their correctness. The sightings tally with the conclusions and it cannot be a mere coincidence that they do.

**[62]** The conduct of the appellant during the encounter with the police officers is of significance. The victim's being brought into the company of the appellant in the car could only have been with evil intentions towards her on his part. Although he told the victim that the two police officers were not police officers but robbers, that was merely to say something to justify his refusal to let her leave the car. There can be no doubt that the appellant and the victim knew that they were police officers.

Yet the appellant refused to leave the car to be searched and even prevented the victim from leaving the car and finally sped off. The conduct of the appellant showed that he was determined to pursue and accomplish his evil intentions.

**[63]** To continue with the narrative, sometime after 12 midnight, Proton Tiara WFN 6871 was sighted again standing at the roadside in front of Bangunan Bali in Sungai Way Jaya, this time by Cik Aminah bte Isahak, a clerk of Petronas at the KLCC. She and other relatives had left her mother's house in two vehicles to fetch her elder sister who was due to arrive from Sabah at the Kuala Lumpur International Airport (KLIA) sometime after 1am. She was in a Kancil driven by Encik Hamid, the elder sister's husband. In it was also a 2-year-old child of a younger sister, whom she held in her lap. The other vehicle, a van, contained the younger sister and her husband, who drove it, and their other child or children. The van was in front. Five minutes after leaving the mother's house they arrived in front of Bangunan Bali, when the van had to turn back to fetch a milk bottle. So the Kancil stopped in front of the Bangunan Bali to await the return of the van. The evidence about this episode was given by Cik Aminah. She saw the Proton Tiara, which was already there when the Kancil arrived and stopped about 25 feet behind it. She noticed a man who, after standing on the road looking at the front right tyre of the Proton Tiara, went into the car and came out again and walked to the Kancil and spoke to Encik Hamid the driver, who had wound down the glass of the driver's window. He wanted to borrow a jack. At first Encik Hamid was reluctant, but after the man said that he needed to drive his wife to the KLIA, he relented and got down and went to the back of the car and got the jack. Cik Aminah said that the conversation between the man and Encik Hamid took about two minutes, during which time she could see the man's face clearly, as the place was well lighted with street lamps and the light from the Bangunan Bali. She identified the man in court as the appellant. According to her, he wore an upper garment like a T-shirt, light-coloured, and trousers and a cap, also light-coloured.

**[64]** After Encik Hamid had got out the jack, the man entered the Proton Tiara with it and came out again after one or two minutes after speaking to a woman who was seated in the passenger seat. He then attempted to change the tyre with the help of Encik Hamid. In this appeal, the identity of the woman as the victim is not in question. About one or two minutes after Encik Hamid went to assist in changing the tyre of the Proton Tiara, Cik Aminah got out of the Kancil to have a close look at the victim because she was curious about her remaining in the car. She said that the victim appeared calm but when she saw Cik Aminah she grew restless and made signs with her eyes, face and mouth, as if she was in fear and asking for help, and turned her face and body towards the man who was working on the tyre. When the man glanced at her she stopped the signals. The signalling and stopping when the man glanced at her went on several times. It was like what had happened in the incident with the two policemen earlier. When the van came back with the milk bottle, the work on the tyre was still going on, and Cik Aminah went to tell her younger sister and the latter's husband about what she saw.

**[65]** The effort to change the tyre went on for about eight to ten minutes but was unsuccessful because the implement used to unscrew the wheel-nuts did not fit. The man then drove the car away.

**[66]** Suspecting something bad was happening involving the victim, Cik Aminah decided to inform the police about it before proceeding to the KLIA. She did this at the Subang Jaya Police Station where her information was recorded in the station diary at 1.35am on 14 June 2006. The recording officer, L/Kpl. Ruslan bin Hamzah, said that he wrote the entry about half an hour after receiving the information, which would have been about 1am. Cik Aminah and company arrived at the KLIA past 2am when her elder sister already arrived.

**[67]** Cik Aminah's identification of the man as the appellant was questioned in this appeal on the ground of the difference in the description of the dress between her evidence and that of L/Kpl. Ravichandran and on account of some alleged impropriety in the identification parade held subsequently, at which Cik Aminah identified the appellant. Apart from the discrepancy in the description of the dress, about which more will be said later, Cik Aminah had every opportunity to register in her mind the face of the appellant when she was in front of Bangunan Bali and there is no reason to doubt her identification of the appellant during the trial. There is also this consideration. To doubt that the man was the appellant is to entertain it as probable that after the incident with the two policemen another man had taken over from the appellant the Proton Tiara with the victim in it. Such a probability, by itself and also in view of other evidence that will be dealt with after this, has to be rejected.

**[68]** Further development in the case was given by the evidence of one Azizam bin Ismail, then a technician employed by what he said was a company known as Utility Information Centre (UTIC), whose offices were at Batu 10, Jalan Bukit Lanjan, Damansara. His evidence was as follows. On 13 June he had been working in Seremban until late evening, when he went home, which was then at Jalan Gasing in Petaling Jaya, after stopping at the company's offices at Bukit Lanjan. He had, before that day, planned to go to Penang to see his wife. Late in the night he left his house driving his employer's motor van to go back to his office to see whether there were any friends of his who also wanted to go to Penang and would accompany him.

**[69]** At about 1am on 14 June 2003 he arrived at Jalan Kelang Lama at a place where there was an ongoing construction of a flyover, and drove into an area under construction, which was walled off from the road in use by plastic barrier blocks and zinc walling, in order to urinate. After urinating, he walked about in search for a piece of wood to support a broken rear seat of the motor van, when he noticed a bluish Proton Tiara which he thought belonged to a security personnel of the construction site. On coming back after finding a piece of wood, he sensed that the car was about to be driven away and when he neared the car he saw what he sensed was a woman, because he could see her breasts which were bare, lying in the back of the car with the head against the rear window. He also noticed the driver, who he felt also saw him and who seemed to be in haste to get away. About a minute later the car was driven away, when he noticed that the front right tyre was punctured. He thought the driver and the woman had been making love (berasmara). He described the driver as a male with a head of thinning hair, almost bald, and a wide brow, but he could not guess his race because the available light, which came from a street lamp rather far away, was dim.

A **[70]** He proceeded to his office at Bukit Lanjan, which was closed, and waited in the compound for about one hour, but found no one there; so some two hours later — probably meaning two hours after he left Jalan Kelang Lama, which would bring the time to about 3am — he drove back on his way to Jalan Gasing, taking the same route. At Jalan Klang Lama he saw the Proton Tiara stationary by the roadside about B 100 meters away from where he had seen it earlier, but this time by the roadside outside the segregated area. He stopped three or four meters behind the car, leaving his headlights on, and then went to it intending to help change the punctured tyre, but no one was in the car. The front window screens were down. He opened the passenger door and saw inside — on the passenger seat, but he was not sure — C a Nokia handphone and a Maybank bag, which he took. He then proceeded to Jalan Gasing, although not to his house, but found no friends there who wanted to go to Penang.

**[71]** Later in the morning he drove to Penang. His wife was to confirm in evidence D his visit to Penang. On the way to Penang, he sold the handphone at a shop in Ipoh, retaining the SIM card. Other evidence was to establish that the handphone was that of the victim. The fact of sale was established by other evidence. As to the bag, he said that he only kept its pocket, which bore the words 'Malayan Banking Yippie Club', and the strap, which he put in the pocket. He had cut out the pocket and the strap using a penknife which was kept in the motor van, but it is not clear from his E evidence when this was done, whether before he drove away after taking the bag and the handphone or some time after that. The cut-out pocket of the bag was to be produced in evidence (P23). Mr Siva Kumar, the MAS Stores Officer mentioned earlier, was to identify the portion, by the writing on it, as similar to the front of the sling bag that the appellant was accustomed to carry with him to work.

F

**[72]** Azizam left Penang for Kuala Lumpur on 15 June 2003. After midnight on 16 June 2003 he stopped at a petrol station in Sungai Buloh and there sold to a motorcyclist the SIM card that he had extracted from the victim's handphone. This fact was proved in evidence.

G

**[73]** Azizam said that he was arrested four or five days later and was detained for twelve days. While in detention the police took him to the shop in Ipoh where he had sold the handphone. In the shop, he saw the picture of the appellant in a Chinese newspaper which happened to be lying on a table. One of the police officers told him H that it was the picture of the suspect in the case. Later, while in detention, he identified the appellant in an identification parade as the man he saw in the Proton Tiara that night. In re-examination in the trial he said that it was easy for him to identify the appellant because he remembered the picture he saw in the newspaper and the face of the man he saw in the Proton Tiara in dim light. In the trial he had identified the appellant in the dock.

I

**[74]** This is a convenient moment to deal with the identification of the appellant by Azizam. We think that the identification is not safe for the following reasons. The man in the Proton Tiara was seen while seated in it in dim light and Azizam was not able to make out his race. It is highly probable, therefore, that he could not make

out his facial features. Further, Azizam admitted in evidence that his identification of the appellant at the identification parade was facilitated partly by his having seen his picture in the Chinese newspaper.

**[75]** At the earlier stages of the cross-examination of this witness, questions were put to him to suggest that he was never at the place at all and did not see what he said he saw. It was only in the last question in cross-examination that it was suggested that that night he had left his house in Jalan Gasing not to go to his office but to roam around in the motor van and that he was involved in the murder of the victim.

**[76]** The learned trial judge, before whom it had been submitted that Azizam was not a truthful witness because, besides other reasons, he was a thief, having stolen the handphone and the sling bag, accepted Azizam's evidence after remarking that a witness is assessed according to the quality of his evidence and not according to the quality of the witness as an individual. He might have meant to say that, notwithstanding that Azizam was a thief, he found his evidence to be true, but the reason why he so found appears to be the consistency of the evidence with the appellant's confession, which has now been ruled to be inadmissible, and its corroboration by the recovery of the handphone, the SIM card and the pocket of the Maybank bag.

**[77]** In the appeal it was also submitted by the appellant's counsel that Azizam's evidence did not make sense and was unreliable and that it was he who was involved in the rape and murder of the victim.

**[78]** Azizam's reason for being at the place in question on two occasions that night is highly questionable. For obvious reasons, his story about going to his office at 1am to look for friends to accompany him to Penang and returning to Jalan Gasing two hours later for the same reason is fantastic. It is highly likely that he was on the road at those hours for some reason that was not innocent. That, and the fact that he stole the handphone and the bag, would justify a finding that he was, at best, a dishonest person and certainly a petty thief.

**[79]** On the other hand, the suggestion that he was involved in the crimes against the victim must be rejected. Since the evidence proves that it was the appellant who had been with the victim up to the time when Cik Aminah saw them in front of Bangunan Bali after midnight, for Azizam to be involved in the crimes, one of two things had to happen. First, after the appellant drove away the victim from Bangunan Bali, he freed the victim, who, left stranded or was roaming about, was picked up by Azizam. That possibility must be rejected because the evidence shows that the appellant was determined to accomplish the purpose for which he made off with the victim from the BSC. Second, after leaving Bangunan Bali the appellant, by force or willingly, transferred custody of the victim to Azizam. That must be rejected because there was no suggestion in the cross-examination of Azizam that some such thing had happened.

**[80]** On the other hand, too, there is no other explanation to account for Azizam's being in possession of the victim's handphone and the pocket of the Maybank bag

except his evidence. In the absence of any other explanation, his evidence must be accepted as to his finding the handphone and the bag in the car.

**[81]** As for Azizam's evidence of seeing the man and the woman in the car two hours earlier, since he was not involved in the crimes against the victim, there was no reason for him to have invented the story. The only evidence that the police had that connected him to the case of the victim was the victim's handphone that he took and the SIM card that had been in it. If what he said happened two hours earlier did not happen, and all that happened was what he said happened the second time, when he took the handphone, then to explain his once having had possession of the handphone he needed only to tell what had actually happened and there would have been no need to create a story about the first occasion. There is therefore no valid reason to doubt his story in that respect, even though he was a thief and a dubious prowler of the highways that night.

**[82]** Azizam described the Proton Tiara as bluish in colour. He could not remember its registration number exactly but he said that it contained the numbers 6, 7, 8 and 1. Those facts and the fact that the victim's handphone was found in the car, seen in the light of previous events, prove beyond reasonable doubt that the car was Proton Tiara WFN 6871 and that the woman in it was the victim. In any case, apart from the suggestion that Azizam was not at the place that night and that he was involved in the crimes on the victim, the defence did not question the identity of the car and the woman in it as the Proton Tiara WFN 6871 and the victim. What the defence questioned was the identity of the man. We have already found that Azizam's identification of him as the appellant is unsafe, but for the same reasons as those stated earlier for rejecting the suggestion that it was Azizam who was involved in the crimes against the victim, the involvement of any other man must be rejected. It is inconceivable that after the Proton Tiara left Bangunan Bali with the victim and the appellant in it, another man took over the car with the appellant in it. The man that Azizam saw must therefore have been the appellant.

**[83]** The next development in the case, according to the evidence, after the events related by Azizam was that at 3.10pm on the same day, 14 June 2003, the appellant lodged a report at the Police Post, Taman Bukit Angkasa, Pantai Dalam, in the Federal Territory of Kuala Lumpur, of having lost his identity card, his Subang Airport work pass, and RM50 cash. He said he realized the loss when he was at Taman Bukit Angkasa at 10.30pm on 13 June 2003. That was a false report because he himself had surrendered his identity card to Ravichandran at about 11.45pm that day.

**[84]** Later on the same day, 14 June 2003, at about 7.30pm, Konstabel Mohd Zulkefli bin Abdul Ghani of IPD Petaling Jaya Utara received instructions to check on Proton Tiara WFN 6871 which was parked behind a shop at No 49, Jalan Petaling Utama 1, Petaling Jaya. On checking, he found the car unlocked and the front right tyre punctured and there was a blood patch on the left side of the rear seat. There was no radio and cassette-player unit in the car but there was a wire dangling at the compartment for it. When DSP Amidon examined the car at 10.20pm on 17 June 2003 he found the left side of the rear seat heavily stained with blood and the

passenger seat slightly stained with blood. Near the stained area of the left side of the rear seat he found six long strands of human hair. The blood on the left side of the rear seat and on the driver's seat and the six strands of hair were proved to be the blood and hair of the victim. The unpaid parking ticket was found on the dashboard behind the steering-wheel. A trace of paint was found on the outside of the windscreen on the driver's side, which the prosecution contended came from the bar at the exit of the BSC parking floors when the car broke through the barrier, as seen on the CCTV videotape.

**[85]** 17 June 2003 was the day on which the body of the victim was found around noon. It was found in a manhole at the 7th milestone Jalan Klang Lama where highway construction works were in progress. It was lying on its back and on its front were two cement-filled motor-vehicle tyres, one lying flat and the other lying on its side. There were pieces of plywood on the body. The front of the body was extensively charred. The tyres and plywood were partially charred. The body was in a state of decomposition and putrefaction.

**[86]** The cemented tyres were of the kind used as a steady base for temporary traffic signs. They were heavy and could not be lifted by one man, but they could be dragged along the ground because they had a handle. The manhole was next to a road but was separated from the road by a brick wall running along it. It would have been on the assumption that the tyres had originally been by the side of the road that it was argued in the appeal that it was impossible for the appellant alone to lift them over the wall to the other side where the manhole was and therefore other persons would have been involved. There was, however, no evidence of where the tyres were before they were taken to the manhole. They could well have been on the other side of the wall already. There is, therefore, no basis for the assumption on which the suggestion of the involvement of other persons was made.

**[87]** The suggestion of the involvement of other persons was also made on the basis of two other factors. One was the fact that the motor car was found without a radio and cassette-player unit. There was no evidence that it was present in the car in the first place when the victim drove it to the BSC on that fateful night. If it was, then someone had stolen it from the motor car before the police found it on 14 June 2003. But that does not mean that he was the person who committed the crimes against the victim. The other factor was the information received by Muniandy, the IO, two weeks after the body of the victim was found that she had been wearing a two-carat diamond ring costing USD20,000 which was not found on the body. The suggestion was that she was the victim of a robbery. That information was, however, hearsay and Muniandy had not been able to verify it as true.

**[88]** The pathologist who conducted the autopsy on the body of the victim, Professor Kasinathan Nadesan, prepared an autopsy report. Some of his findings in the report need to be set out. He said, 'A folded long cloth, somewhat similar to 'crepe bandage' was found wound round the mid neck, at least three rounds. It was partly burnt and partly intact with smell of possible kerosene or petrol present. Underneath, the neck skin was somewhat spared and protected in the form of a band'. He further said, 'Both arms were brought to the front of chest and tied

A together with a long folded cloth, most likely white in colour, were [sic] partially burnt. There were 2–3 rounds gone around the wrist'. He said that the upper vagina was intact and that 'swabs and smears were obtained from the upper vagina'. He said, 'Large amount of blood with sludging was found in the lower abdomen and pelvis suggestive of ante-mortem bleeding'. He said that the burns on the body were B post-mortem. He gave the cause of death as 'Consistent with Strangulation' and said that death had taken place around six or seven hours after the last meal.

**[89]** As to the cloth found wound round the neck, which the witness identified as exh P59A, he said in oral testimony that its colour was 'off white' and 'fadely brownish' and that it was soft and elastic. He said that the cloth was similar C to the naked eye to another cloth, exh P82A, of which more will be said later. He said that the cloth was wound tight round the neck, with a knot, which was consistent with strangulation. In cross-examination he said he found no evidence of damage to the internal structure of the neck and that the muscles, tissues, laryngeal cartilage and trachea were intact.

D

**[90]** The pathologist identified the cloth binding the wrists as exh P61A. In cross-examination he said that by looking at photograph P2M, he could not reject the possibility that the cloth was part of a dress such as a scarf.

E **[91]** As to the internal bleeding, he said in examination-in-chief that it was caused by a violent trauma with a blunt object or by a stab with a sharp instrument. In cross-examination he was unable to say which was the more likely cause of the bleeding, a blunt object or a sharp object, but he said that it could also have occurred as a result of a heavy fall on a blunt object. In examination-in-chief he said that the haemorrhage occurred before strangulation and that haemorrhage itself could have F caused death, but with continued strangulation during haemorrhaging, strangulation could be the cause of death.

**[92]** As to whether the burning occurred before or after death, he said in examination-in-chief that there was no soot in the trachea but it was possible for one G to die of burning without soot particles being found in the trachea. He was, however, of opinion that on a balance of probabilities the burning was after death. He stated as a logical conclusion from the circumstances of this case that the victim was burnt after death and that the cause of death was strangulation and also haemorrhage, although in cross-examination he said that although there was no soot in the trachea H he could not reject the possibility that the victim was alive when the burning started and that medically he could not reject the possibility of death by burning.

**[93]** The learned trial judge said at p 44 of his judgment that the cause of death was consistent with strangulation and that the burning was after death. It is not clear whether that was his own conclusion after weighing all aspects of the pathologist's I testimony or whether he merely recounted particular bits of the pathologist's testimony. It appears to be the latter possibility.

**[94]** As to the time of death, which was given as six or seven hours after the last meal, the pathologist said in evidence that the estimate of the time of death of a

person is only an educated guess and is not conclusive, and that in this case, because of the burning, he was not able to state the time of death with precision. If the last meal was at 10pm on 13 June, six or seven hours after that would be 4 or 5am of 14 June. That accounts for the latest time in the charge being 5am. The earliest time, 1am of 14 June, was about the time that Azizam came upon the appellant and the victim in the Proton Tiara.

**[95]** There was some confusion between exh P59A and exh P61A which the appellant's counsel criticized the judge for not saying anything about. The confusion was this. Whereas the pathologist said that P59A was the cloth found round the neck of the victim and P61A was the cloth binding the wrists, the trial judge, at p 36 of his judgment, said that envelope P61A was the cloth found round the victim's neck and the chemist said that envelope No 17 (which became P59 and contained P59A) was marked as containing a sample of cloth from the wrists of the victim and that envelope No 19 (which became P61 and contained P61A) was marked as containing a sample of cloth from the victim's neck, which, in his report, he described as beige-coloured (p 2201 appeal record). In cross-examination (p 288 trial notes), the chemist said that although the cloth P61A was brownish in colour, under the microscope it was beige. Before proceeding further, it has to be explained that actually P59A and P61A were plastic bags containing the samples of cloth, so that each sample was identified also by the number of the plastic bag containing it.

**[96]** According to the pathologist (pp 342, 343 trial notes), it was he who took the fabrics found round the neck and wrists of the victim, and it was done under Muniandy the IO's instructions, but he did not know who put the cloth from the wrists in the plastic bag P61A. After the scraps of cloth had been put in the plastic bags P59A and P61A, he handed them over to Muniandy on 19 June 2003. According to Muniandy (pp 749, 750 trial notes), he was present during the autopsy and it was he who labelled the exhibits taken from the victim's body then and there according to the pathologist's oral guidance, but whereas at first (p 749 trial notes) he is recorded as saying that it was the envelopes that he received from the pathologist and marked as No 17 (P59) and 19 (P61), that is, envelopes containing the plastic bags, later (p 750 trial notes) he is recorded as saying that it was the fabrics themselves that he received from the pathologist and put in plastic bags and labelled. He was asked (p 750 trial notes) — and that was in examination-in-chief — about the pathologist's evidence that the cloth P59A was from the victim's neck and the cloth P61A was from the victim's wrists and his reply, as recorded, was that he did not know. We take it that Muniandy was not able to explain away the confusion.

**[97]** Apart from that confusion between the two materials in P59A and P61A, there is the trial judge saying (at p 60 of his judgment) that according to the chemist the materials were of the same type, when there was no such evidence.

**[98]** In our opinion, however, the confusion is not material. There is no doubt that a cloth was wound round the neck of the victim and another cloth was wound round the wrists of the victim. The importance of whether P61A was found round the neck of the victim or round the wrists does not lie in the need to show the capability of the cloth of causing strangulation. The importance to the prosecution of P61A is to

connect it to the appellant through a comparison with exh P82A which has been mentioned earlier and will be dealt with next. So long as it was shown, as indeed it was, that P61A was used on the victim, be it round the neck or round the wrists, the prosecution would have another piece of evidence to connect the appellant to the crime if they could link P61A to the appellant.

**[99]** P82A was a piece of cloth that originated from the MAS cleaning-equipment store at Hangar 2, Subang Airport. Muniandy the IO named it the Tool Crib Store. The store was under the charge of Mr Siva Kumar a/l Ramiah, the MAS Stores Officer, who has already been mentioned. Among the items kept in the store were rolls of muslin cloth, which were kept at the rear of the store, with one roll always kept in a cabinet in the store. The cloth was used to clean aircraft, for which purpose it was cut into pieces the size of a handkerchief and given out to the workers of the cleaning companies, including SASB, whose employee the appellant was. In the daytime, when Siva Kumar and the two workers under him worked in the store, any of the cleaning workers could obtain the pieces of muslin cloth from the store. They had to fill up a loan chit although the cloth did not need to be returned. When Siva Kumar and his workers stopped work between 4.00 and 7.00pm, the store was locked and a key to the store was left at the MAS Operations Office, which was near the store and the cleaning workers' restroom and which was manned by a MAS supervisor who supervised the SASB staff at night. The key to the store, however, could be obtained from the MAS supervisor by any team leader of the cleaning company, of whom the appellant was one, and he could take from the store whatever he required. These facts are from the evidence of Siva Kumar, who said that if the thing that was taken was a portion from a roll of muslin cloth, he would not have realized it as he seldom checked on the stock of muslin cloth because the cloth was of no value, meaning, presumably, because it was a disposable.

**[100]** There was a discrepancy in the evidence as to the currency of the use of the muslin cloth to clean aircraft. Norhazli bin Izham, the appellant's assistant team leader, said in cross-examination that MAS stopped supplying muslin cloth to the cleaning workers in 2002 because most workers were using tissue paper to clean the glass of the windows of aircraft, whereas according to Siva Kumar muslin cloth continued to be given to the cleaning workers. The discrepancy is not material because the fact remained that rolls of muslin cloth were, on Siva Kumar's evidence, still being kept in the store, and this was borne out by the fact that on 7 October 2004, after the trial had commenced, Muniandy the IO took a roll of four sheets of the muslin cloth (P42) from the cabinet in the store and issued a search list for it (P43).

**[101]** Siva Kumar's evidence established beyond any doubt that it was possible for the appellant to take away from the store, particularly at night, a portion of the muslin cloth from any of the rolls in the store. Although there were security personnel at the entrance to Hangar 2 to check on people coming in and out, it is not likely that they would be on the lookout for cleaning workers taking out pieces or portions of the muslin cloth since it was a disposable. There is no evidence that

the security at Hangar 2 was of such a high standard, as submitted by the appellant's counsel, as to render it difficult for any worker to take away a large piece of muslin cloth.

**[102]** What Muniandy did was to cut a piece measuring 22 x 25cm from the roll P42 and send it to the chemist for comparison with P61A, the cloth or scraps of cloth found wound round the neck or wrists of the victim. Exhibit P82A was the piece of muslin cloth that Muniandy cut out from the roll P42 and sent to the chemist. The chemist received it on 20 November 2003 (not 3 March 2004, as the judge said), in the midst of the trial, together with P61A, which he received the second time, the first time being on 20 June 2003 and for another purpose.

**[103]** According to the chemist, as also according to Muniandy, P82A was beige in colour. He said that microscopic examination revealed that P61A was of the same colour as P82A and that the fibres of both materials were not only knitted or weaved in the same pattern but also in the same direction, meaning that superficially they were materials of the same kind and also, according to the chemist, that there was a great probability that the two materials came from the same batch of production. The chemist further said that chemical analysis showed that both materials were made of cotton of the same chemical characteristics. The dissolvent test showed that both materials dissolved completely in sulphuric acid and cotton was one substance that dissolves completely in sulphuric acid. The burning test showed both materials leaving only a little ash after burning.

**[104]** It came out during the cross-examination of the chemist that the dissolvent and burning tests were not conclusive of both materials being cotton. They did not preclude both being something other than cotton or one being cotton and another being some other fibre or both being a mixture of cotton and some other material or one being a mixture of materials different from the mixture of the other. That is because cotton is not the only substance that dissolves completely in sulphuric acid and because a mixture of cotton and some other fibre could also leave little ash after burning. But in re-examination the chemist affirmed that the two materials were of pure cotton.

**[105]** We think that the microscopic examination of the two materials was important. It established by the pattern of weave that they were of the same kind, that is to say, that the fabric that was wound around the neck or wrists of the victim was the same kind of fabric that was kept in the MAS store to which the appellant had easy access. The chemist was not cross-examined as to the reliability of comparison by pattern of weave, so as to show, for example, that the pattern of weave of P82A was a common pattern shared by many other fabrics. The chemical tests, while not proving conclusively that the two materials were made of cotton or of the same substance, did not prove that the two materials were not of the same kind, that is to say, did not disprove what the microscopic examination revealed. The evidence of Muniandy the IO in cross-examination is that even after the trial had commenced he was curious to find out the source of the fabrics found around the neck and wrists of the victim that would link them to the appellant and he decided to go to Hangar 2 where the appellant worked. At first he thought of bandaging fabric, but after

taking two rolls of bandage from the first-aid box in the Utility Services Operation Room he was told that there was another place, that is the Tool Crib Store, where the appellant had access to cleaning cloth. That was how he came to take away the roll of muslin sheets P42. The result of the chemist's examination served to establish the link that Muniandy the IO was looking for.

**[106]** On the day of the arrest of the appellant, 20 June 2003, the police found, under a table in the bedroom occupied by the appellant, his wife and their baby, a pair of blue jeans sized 28 of Jack Blue Classics brand (P68A), a blue baseball cap (P102A) and a dark-blue sweater of Cambridge brand (P67A). The jeans were in a crumpled state and bore patches of stain.

**[107]** The swabs and smears obtained by the pathologist from the victim's upper vagina proved the presence in the vagina of semen. The semen was established to belong to the appellant. The stains on the Jack Blue Classics jeans were established to be stains of the blood of the victim. These proofs were established by DNA profiling. The results of the DNA profiling were obtained by the use of a computer. It was submitted on behalf of the appellant in the appeal that the documents concerned that were produced by the computer, which established those results, or from which those results were established, are not admissible in evidence under s 90A of the Evidence Act 1950. Subsections (1) and (2) of the section provide as follows:

> 90A. (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.
>
> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

Subsection (4) provides as follows:

> (4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

Subsection (6) provides as follows:

> (6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

**[108]** Under sub-s (1), the admissibility of a document produced by a computer or of a statement contained in the document is conditional on the document's being

produced by the computer in the course of the computer's ordinary use. It was argued on behalf of the appellant that the documents concerned in this case and the statements contained in them were not admissible because there was absent such a certificate as is specified by sub-s (2) to prove that the document was produced by the computer in the course of the computer's ordinary use. Reliance was placed on *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678, where Vincent Ng J said at p 694I:

> In my analysis, s 90A(2) in essence implies that a document which derives its existence solely through the production of a computer could only be tendered to the court by — or through a certificate signed by — the person who is responsible for the management of that computer.

That statement does not mention the matter of proving that a document was produced by a computer in the course of its ordinary use, which is what sub-s (2) is concerned with. The statement speaks instead of the means by which the document is to be 'tendered to the court'. But putting the best construction on the statement, it might be taken to be intended to say that proof that a document was produced by a computer in the course of its ordinary use can be given either by a certificate signed by such a person as is specified by sub-s (2) or, in lieu of the certificate, by the person himself coming to court and giving oral evidence to that effect. In the present case there was no proof by either means.

**[109]** This court has, however, decided in *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1, at p 11, that because the word used in sub-s (2) is 'may', a certificate under the subsection is not mandatory for proving that a document was produced by a computer in the course of its ordinary use and that so long as there is proof that a document is produced by a computer, sub-s (6) applies to deem the document to be produced by the computer in the course of its ordinary use. In this case there is no question that the DNA documents concerned were produced by a computer. Therefore, they are to be deemed to have been produced by the computer in the course of its ordinary use and they and the statements contained in them were admissible.

**[110]** Recently this court again had occasion to consider s 90A. It was in *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134, where Augustine Paul JCA (now FCJ)spoke for the panel. The decision in Gnanasegaran was considered. He said in para [28] at p 153 that sub-s (6) and sub-s (2) 'are incompatible and inconsistent with each other' and 'If therefore s. 90A(6) is to function as a substitute for the certificate it will render nugatory s 90A(2)'. We entirely agree. But sub-s (6) is there. It cannot be ignored and must be given effect to. And Augustine Paul JCA did not go to the extent of suggesting that sub-s (6) should be ignored and not be given effect to. Instead he sought to defend the existence of sub-s (6) by making an effort to reconcile the two subsections, and he arrived, in para [30] at p 154, at this conclusion: 'Thus s 90A(6) can only apply to a document which was not produced by a computer in the ordinary course of its use, or, in other words, to a document which does not come within the scope of s 90A(1)'. An indication of what such a document might be was given earlier on the same page in the following words: 'The document, even though produced by the computer, may not have anything to do with the ordinary use of the computer. It may, for example, be a letter produced

by the computer which has no bearing on the ordinary use of the computer'. It is, according to the decision, only such a document that sub-s (6) applies to and that the subsection requires to be deemed to be produced by the computer in the course of its ordinary use.

**[111]** With respect, we do not find such a distinction to be realistic or workable. The question of the application of sub-s (6) only arises where there is no certificate under sub-s (2). For the suggested application of sub-s (6), it must first be established that the document was produced by the computer not in the course of its ordinary use and that will be by oral evidence. But once it is established by oral evidence that the document was produced by the computer not in the course of its ordinary use, sub-s (6) cannot be resorted to in order to deem that the document was produced by the computer in the course of its ordinary use because it would be accepting a legal fiction in the presence of reality to the contrary. Therefore if sub-s (6) can apply only in the case of a document that is produced by a computer not in the course of its ordinary use (or, which is the same, that is not produced by a computer in the course of its ordinary use), sub-s (6) can never be applied. The suggested application of sub-s (6) amounts to saying that, in the absence of a certificate under sub-s (2), a document can only be deemed to be produced by a computer in the course of its ordinary use if it in truth is a document produced by the computer not in the course of its ordinary use, which is utterly absurd.

**[112]** Having said that, it has to be said that sub-s (6) is a matter of some concern because, as Augustine Paul JCA said, it would render nugatory subsection (2), which requires proof, which may be by a certificate, that a document that is produced by a computer is produced by it in the course of its ordinary use, which is proof of the important condition in sub-s (1) for the admissibility of a document produced by a computer. The rendering as nugatory the requirement of such proof ultimately means doing away with the condition in sub-s (1), as a condition to be satisfied by the party who seeks to put the document in evidence, because all documents produced by a computer will be admissible by virtue of sub-s (6) irrespective of whether or not they were in fact produced in the ordinary course of the computer's use, unless the opposite party proves otherwise, by cross-examination or specific evidence, which will be an unfair shifting of the burden of proof to the party against whom the document is sought to be used.

**[113]** It is disquieting that two damning items of proof against the appellant are dependent on such a bewildering provision as sub-s (6) is. Should it have been there in the first place? Has some qualification that would make is compatible with sub-s (2) been overlooked? But it is there and there is this court's decision in Gnanasegaran, from which I see no valid reason to depart, and its clear statement must be given effect to, there having been no suggestion that it ought to be ignored, a suggestion that would require strong legal argument to support it.

**[114]** There is another aspect of the decision in *Hanafi bin Mat Hassan* that has to be considered because in a sense it differs from the decision in Gnanasegaran and because it also is indicative of a possible defect or weakness in the manner of design of s 90A. The section lays down only one requirement for the admissibility in

evidence of a document produced by a computer or of a statement in the document. The requirement, which is in sub-s (1), is that the document was produced by the computer in the course of its ordinary use. According to sub-s (2) the fulfilment of that requirement may be proved by a certificate signed by a person qualified under the subsection. Now according to sub-s (4) it shall be presumed by virtue of the certificate that the computer 'was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced' but there is no requirement in s 90A that for a document produced by a computer or a statement in the document to be admissible in evidence the computer must also be in good working order and must be operating properly as stated in the presumption. As has been stated, there is only one requirement, and that is in subsection (1), the requirement being that the document must be produced by the computer in the course of its ordinary use. By way of comparison, in s 69 of the Police and Criminal Evidence Act 1984 of England there is no such requirement, but there are other requirements, and all these requirements, including that 'the computer was operating properly', are laid down in sub-s (1). That subsection, as reproduced at p 228 of *R v Shepherd* [1993] 1 All ER 225, a case which in *Hanafi bin Mat Hassan*, Augustine Paul JCA had occasion to refer to at p 302D–E, provides as follows:

> In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown — (a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer; (b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and (c) that any relevant conditions specified in rules of court under sub-s (2) below are satisfied.

**[115]** But in *Hanafi Mat Hassan*, in paras [22] and [23], Augustine Paul JCA said in effect that even where the deeming in sub-s (6) of production in the course of ordinary use of the computer applies, thus satisfying the requirement of sub-s (1), 'the requirement of s 90A(4) must still be established' and that by oral evidence (since in a case of reliance on sub-s (6) there would be no certificate under sub-s (2) to give rise to the deeming in subsection (4)). It must be proved by oral evidence that the computer was in good working order and was working properly as stated in sub-s (4). But sub-s (4) does not lay down requirements. It lays down presumptions. If the matters in sub-s (4) are requirements they would be in sub-s (1). There was no such decision in *Gnanasegaran*, which proceeded on the basis that the only requirement for the admissibility of a document produced by a computer is that it was produced in the course of the computer's ordinary use.

**[116]** The decision in *Hanafi Mat Hassan* can only be understood on the footing that because sub-s (4) presumes that the computer has the stated qualifications, it must be implied that s 90A requires the computer to have those qualifications as another condition for the admissibility of documents produced by it and of their contents. The question arises whether it is permissible, in interpreting or construing s 90A, to imply from the presumption in sub-s (4) the existence of a requirement that has not been expressly laid down. Against such an implying it may be argued that since section 90A does not lay down a requirement as to the qualifications presumed

in sub-s (4), the presumption has nothing to hook on to and must therefore fall and be overlooked as ineffective. This question has not been argued in the appeal. *Hanafi Mat Hassan* was not in existence when the appeal was argued. Where s 90A is concerned, the appeal was argued on behalf of the appellant on the basis that the only condition for admissibility is that, as expressly laid down in sub-s (1), the document was produced by the computer in the course of its ordinary use. For the purposes of this appeal, we would adopt the prima facie position that under s 90A that is the only condition for the admissibility of a document produced by a computer and of the statements in the document.

**[117]** The appellant's counsel submitted that the jeans or trousers had not been proved to be those of the appellant because they had not been tried on him to prove that the size fitted him. Since, however, the trousers were found in the appellant's bedroom in a house which, according to the evidence, was occupied only by him, his wife and child, they must have belonged to him. The notion that trousers belonging to another person and bearing the blood of the victim would have found their way into the appellant's bedroom is preposterous.

**[118]** The confession of the appellant having been ruled to be inadmissible, the evidence that is available to the prosecution to rely upon and that has been set out is circumstantial evidence. As to what circumstantial evidence is, it is needful to quote only that part of the summing up to the jury that is set out in *Idris v Public Prosecutor* [1960] MLJ 296 at p 297:

> With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case of *Belhaven & Stenton Peerage* reported in 1875 — 6 Appeal Cases, p 279:
>
> > My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.
>
> In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all …

**[119]** Of the evidence that has been set out, certain bits of it are strong rays and others are not so strong or are feeble rays. But the feeble rays cannot be disregarded. Each piece of evidence is an important strand in the entire fabric and serves to make up that fabric and to strengthen it.

**[120]** The evidence, when considered in its entirety, leads only to one conclusion, that it was the appellant, and no one else, who was responsible for what happened to the victim that night. The appellant had absented himself from work to go to the BSC, where he abducted the victim from the parking area in the building,

determined to carry out an unholy intent on her. What impelled him to go to the BSC or why he picked on the victim are matters that only the appellant knows and that will be of interest to the criminologist or a criminal psychologist but are not relevant in this case. The fact is that the appellant did abduct the victim, who was so much in fear that she did not dare to make a run for it on the two occasions when others were present, the two police officers on one occasion and Cik Aminah and company on the other, and drove her to the place where the victim met her death. The presence of the appellant's semen in the vagina of the victim proves that the appellant had intercourse with the victim. The presence of the victim's bloodstains on the appellant's trousers proves that the appellant was with the victim at least after she started to bleed. The presence of much blood of the victim on the rear seat of the Proton Tiara proves that the cause of bleeding took place when the victim was in the back seat of the car, where she was, according to Azizam's evidence, at about 1am on 14 June 2003. From those proofs, and the complete absence of a possibility of the involvement of another person, the inevitable conclusion to be drawn is that it was the appellant who caused the bleeding, applied the ligature to the victim's neck and tied her wrists, although not necessarily in that order, and placed her in the manhole and set fire to her or her body. That inevitable conclusion does not require proof of the link between the fabric around the victim's neck or wrists with the appellant, but such proof as there was, which cannot be described as feeble, contributes to demonstrate physically the correctness of the inevitable conclusion.

**[121]** The only evidence that appears to disturb what would otherwise be a perfect convergence of evidence to a point, the point being the identity of the appellant, is the evidence as to the attire of the man seen at different times and by different persons that night. Whereas L/Kpl Ramachandran said that the man he questioned wore a dark-blue sweater, the man in the CCTV photographs wore a light-coloured upper garment and Cik Aminah said that the man she saw wore a light-coloured upper garment like a T-shirt. Whereas Ramachandran said that the man wore a dark-coloured cap, the man in the pictures wore a light-coloured cap and Cik Aminah said that the man wore a light-coloured cap. Whereas the man in the pictures wore dark trousers, Cik Aminah said that the man she saw wore light-coloured trousers.

**[122]** It has already been said that the man that Ravichandran encountered was, from other evidence, especially the fact that the man surrendered an identity card which Ravichandran was satisfied was that of the appellant by a comparison of the photograph in it with the face of the man, none other than the appellant. It has already been said that the man that Cik Aminah saw was the appellant because Cik Aminah had ample opportunity to register his face and because it was inconceivable that another man took over the car and the victim after the encounter with Ravichandran. The evidence of the blood on the appellant's trousers and the presence of the appellant's semen in the body of the victim prove that the appellant was with the victim after the encounter with Cik Aminah. Not only is it inconceivable that another man took over the car and the victim after the encounter with Ravichandran, if that had been the case it is doubly inconceivable that the appellant would turn up to be again with the victim, as he was, after the occurrence with Cik Aminah. These considerations so overwhelmingly outweigh any doubt as to

identity which the appellant's counsel contends to exist by reason of the discrepancies in the evidence as to the attire of the man, that the discrepancies have to be disregarded as explainable otherwise.

**[123]** As to the dark-blue sweater that Ravichandran said the man wore, the chemist found two strands of human head-hair on the dark-blue Cambridge sweater found in the appellant's house. Although DNA profiles could not be successfully developed from the two strands of hair, the chemist found that they bore similar characteristics to other strands of hair proved by DNA profiling to be the victim's hair, and was of opinion that the two strands of hair could have come from the same source, that is to say, they could have been the victim's hair. So the appellant could have worn the dark-blue sweater when he was with the victim. It is probable, as the learned DPP suggested, that the appellant had with him the sweater, which he carried in his bag and, when driving the car, he put on over the garment he was wearing due to the cool temperature inside the car. When Cik Aminah saw him, it is probable that he had taken off the sweater because he was having a problem with the punctured tyre of the car and had to get out of the car to attend to the problem. He had no need to continue wearing the sweater then.

**[124]** As to the cap, it is not improbable that the appellant also had another cap with him, perhaps the blue baseball cap that the police found in his house, and this he was wearing together with the dark-blue sweater when Ravichandran encountered him.

**[125]** As to the trousers, the victim's blood on the blue jeans found in the appellant's house proves that those were the trousers worn by the appellant that night. But Cik Aminah said that the man she saw wore light-coloured trousers. Since it is not probable that after the episode with Cik Aminah the appellant changed trousers from a light-coloured pair to the blue jeans, it being a somewhat elaborate process and there was no conceivable reason for him to do that — the only explanation for the discrepancy is simply that Cik Aminah was mistaken as to the colour of the trousers. It is a common experience when one meets a person face to face that what remains firmly and predominantly registered in the mind is the face, but when it comes to the colour of the various items of attire that the person wore, the mind has a tendency to play tricks. Cik Aminah's mind might have been influenced by the predominant colour of the shirt into attributing the same colour to the trousers. The same may also be said additionally in the case of Ravichandran as regards the cap. His mind might have been similarly influenced by the predominant colour of the sweater.

**[126]** These are all conjectures but they are not unreasonable conjectures to explain away the discrepancies in the matter of colour of attire in face of the rest of the entire evidence that points inevitably to the appellant, and to the appellant only, as the person seen by the CCTV, by Ravichandran, by Aminah and by Azizam, so as not to allow the discrepancies to shake the integrity of the conclusion drawn from the rest of the evidence. It is only when such a discrepancy cannot be explained away by any reasonable theory or conjecture that it becomes a cause to question the integrity of the conclusion. If, for example, Ravichandran was not mistaken that the man he saw

wore a dark-blue sweater, but on the evidence it is impossible for the appellant to have had with him or to obtain a dark-blue sweater that night, then there would be a real cause to doubt whether it was the appellant whom Ravichandran dealt with, even though the man gave him the appellant's identity card and Ravichandran said that the face in the identity card was that of the man. But such was not the case here.

**[127]** As regards the charge of rape, intercourse having been proved, the question to be answered is whether the evidence provides proof beyond reasonable doubt that the intercourse was without the free consent of the victim. The question of whether there was consent must be decided on circumstantial evidence. The victim having been abducted by the appellant, a total stranger, when engaged in the innocent activity of getting the parking ticket from the car for her mother, and been driven in a state of fear to the fateful destination by the appellant, who was intent on accomplishing his designs on her, it is impossible to entertain any doubt that the intercourse was without the free consent of the victim. The conviction for the charge of rape was therefore right.

**[128]** As regards the charge of murder, the appellant's counsel argued that the cause of death being unspecific, the mens rea, that is the intention to cause death, is uncertain because it would depend on the actual cause of death. Whether the cause of death was strangulation, or the infliction of an injury on the victim that caused the internal bleeding, or whether it was a combination of both, or whether it was burning after the victim, who would then have been alive, had been placed in the manhole, on the evidence, viewed as a whole, it was the appellant who did to the victim whatever it was that caused her death and, viewing the evidence as a whole, including the fact that the appellant had raped the victim, there would be no basis for entertaining any probability that the appellant did what he did other than with the intention of causing the death of the victim. The conviction for murder was therefore right.

**[129]** The case of *Mohamed Yasin bin Hussin v Public Prosecutor* [1976] 1 MLJ 156 that the appellant's counsel relied on is distinguishable. The circumstances were entirely different from those in the present case. The appellant in that case, on his own confession, had gone to a woman's provision shop intending to burgle it but, on being overcome by sexual desire when struggling with her, he raped her, after which he discovered that she was dead. The pathologist found her to have sustained fractures of several ribs which resulted in cardiac arrest and which, in the pathologist's opinion, were sufficient in the ordinary cause of nature to cause death. The trial court, acting on the opinion of the pathologist to that effect, found that the fractures were caused by the appellant's act of sitting forcibly on the victim's chest in the course of a violent struggle when she was resisting his attempt to rape her. The appellant was found guilty of murder under limb (c) of the definition of murder in s 300 of the Penal Code: doing an act causing death with the intention of causing bodily injury sufficient in the course of nature to cause death. The Privy Council ruled that under limb (c) the prosecution had to prove that in forcibly sitting on the victim's chest the appellant intended to cause the fractures, but there was no evidence from which such an intention could be inferred. The appellant's conviction for murder was set aside.

**[130]** The facts of this case, on the other hand, do not provide occasion for considering whether any act that the appellant would have done to the victim, be it strangling, or hitting or stabbing, or burning, might have lacked that element of intention that would bring it under limb (b) or (c) of the definition of murder, because the evidence in its totality is capable of only one inference, and that is, that whatever it may have been that the appellant did to the victim that caused her death was done with the intention of causing death, so as to fall under limb (a). No theory has been advanced as to what, as the evidence stands, might have actually happened that would take the appellant's act outside that limb and yet not bring it under either limb (b) or (c).

**[131]** We therefore dismiss the appeal and confirm the convictions and sentences for rape and murder.

*Appeal dismissed. Convictions and sentences for rape and murder confirmed.*

Reported by John Paul Simon